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No. ———



IN THE

# Supreme Court of the United States

October Term, 1982

In re: Exterior Siding and Aluminum Coil Antitrust Litigation (MDL 454)

ALSIDE, INC., et al.,

*Petitioners,*

vs.

THE HONORABLE CHARLES R. WEINER, Judge, United States District Court, sitting by designation in the District of Minnesota, *Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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1983—Northwest Brief Printing Co., 3010 2nd St. No., Minneapolis 55411—588-7506

## QUESTIONS PRESENTED

1. Whether a multidistrict transferee judge is bound by "law of the case" principles in exercising his discretion to modify or vacate orders previously entered by a transferor judge in the same case

2. Whether a writ of mandamus may issue to supervise and control a transferee judge who has rejected the law of the case and substituted his discretion for that exercised by another judge in prior rulings in the same case

3. Whether an equally divided vote of a Court of Appeals rehearing a panel decision en banc should be deemed an affirmance of the panel decision

## PARTIES INVOLVED

The petitioners are Alcan Aluminum Corporation, Alside, Inc., Aluminum Company of America, Kaiser Aluminum & Chemical Corporation and Reynolds Metals Company, petitioners. The parents, subsidiaries, and affiliates of petitioners are set forth in Appendix J, *infra*.

The plaintiffs below include Hoyt Construction Company, Inc., Minnesota Exteriors, Inc., Western Builders, Inc., Lagar Construction Company, Midwest Builders and Materials, Inc., and Riverside Builders, Inc.

## TABLE OF CONTENTS

## APPENDIX INDEX



## TABLE OF AUTHORITIES

**Cases:**

**Statutes and Rules:**



**Miscellaneous:**

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### INTRODUCTORY PRAYER

Petitioners Alcan Aluminum Corporation, Alside, Inc., Aluminum Company of America, Kaiser Aluminum & Chemical Corporation, and Reynolds Metals Company respectfully pray that a writ of certiorari issue to review the order of the Court of Appeals for the Eighth Circuit denying their petition for a writ of mandamus.

## OPINIONS BELOW

The decision of the Court of Appeals en banc, issued without opinion, is reported at 1983-1 Trade Cas. (CCH) ¶ 65,298 (8th Cir. 1983); it appears at Appendix I, *infra*. The opinion of the panel of the Court of Appeals is reported at 696 F.2d 613 (8th Cir. 1982) and is set forth at Appendix H, *infra*. The orders of the United States District Court for the District of Minnesota appear in Appendices A-G, *infra*. Three of those orders are reported at 1978-2 Trade Cas. (CCH) ¶ 62,243 (D. Minn. 1978); 1980-1 Trade Cas. (CCH) ¶63,221 (D. Minn. 1980); 538 F. Supp. 45 (D. Minn. 1982).

## JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit, entered on March 28, 1983, is set forth in Appendix I, *infra*. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1407(a) & (b):

> (a) When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion

of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated: *Provided, however,* that the panel may separate any claim, cross-claim, counterclaim, or third-party claim and remand any of such claims before the remainder of the action is remanded.

(b) Such coordinated or consolidated pretrial proceedings shall be conducted by a judge or judges to whom such actions are assigned by the judicial panel on multidistrict litigation. For this purpose, upon request of the panel, a circuit judge or a district judge may be designated and assigned temporarily for service in the transferee district by the Chief Justice of the United States or the chief judge of the circuit, as may be required, in accordance with the provisions of chapter 13 of this title [28 U.S.C. §§ 291 *et seq.*] With the consent of the transferee district court, such actions may be assigned by the panel to a judge or judges of such district. The judge or judges to whom such actions are assigned, the members of the judicial panel on multidistrict litigation, and other circuit and district judges designated when needed by the panel may exercise the powers of a district judge in any district for the purpose of conducting pretrial depositions in such coordinated or consolidated pretrial proceedings.

28 U.S.C. § 1651(a):

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

## STATEMENT OF THE CASE

This case concerns the failure of a multidistrict transferee judge to give proper weight to "law of the case" con-

siderations in vacating an order of a previous judge, sitting in the same district, denying class certification. The lower courts have not articulated a consistent standard for applying the "law of the case" doctrine in multidistrict proceedings under 28 U.S.C. § 1407. Absent this Court's guidance, the ad hoc nature of similar determinations by transferee judges will encourage misuse of both the mutidistrict and class action devices, at great cost to individual litigants and to the judicial system.

The present action arose from an antitrust suit filed in 1975 by the original plaintiffs in the District of Minnesota.[1] In 1978, those plaintiffs moved for certification of a nationwide class of purchasers of siding and aluminum siding coil. Judge Donald D. Alsop denied that motion[2] in an opinion subsequently characterized as "detailed," "well-reasoned" and "painstaking." *In re Exterior Siding and Aluminum Coil Antitrust Litigation*, 696 F.2d 613, 615, 618 (8th Cir. 1982), Appendix H.

Plaintiffs sought class certification on two other occasions before Judge Alsop. On January 21, 1980, he denied plaintiffs' motion for a more narrowly defined nationwide class,[3] and on February 8, 1980, he denied plaintiffs' renewed motion. Appendices C and D.

The case lay dormant for ten months until, on December 9, 1980, a new complaint was filed in the Northern District of California that was, as characterized by judges of

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[1]Defendants in that action in addition to Petitioners were Bethlehem Steel Corporation, Kaiser Aluminum & Chemical Sales, Inc., Mastic Corporation, Revere Copper and Brass, Inc., and United States Steel Corporation.

[2]*Hoyt Construction Co. v. Alside, Inc.*, 1978-2 Trade Cas. (CCH) ¶ 62,243 (D. Minn. 1978), Appendix A, *infra*.

[3]*Hoyt Construction Co. v. Alside, Inc.*, 1980-1 Trade Cas. (CCH) ¶ 63,221 (D. Minn. 1980), Appendix B.

the Eighth Circuit, a "virtual carbon copy" of the Minnesota complaint. 696 F.2d at 616. On December 22, 1980, another carbon-copy complaint was filed in the Northern District of Illinois.[4] The new plaintiffs, who were members of the class described in the original complaint, had been in contact with the Minnesota plaintiffs before the new actions were filed. 616 F.2d at 615.

Upon the parties' motions, the Judicial Panel on Multidistrict Litigation entered an order on April 8, 1981, consolidating the actions, pursuant to 28 U.S.C. § 1407, in the Districtt of Minnesota.[5] *In re Exterior Siding and Aluminum Coil Antitrust Litigation*, No. 454 (J.P. M.D.L., April 8, 1981), Appendix E. In selecting the forum for the conduct of pretrial proceedings, the Panel noted that the Minnesota action was the "most advanced" and that rulings on matters such as amendments to the complaints, discovery issues and "class certification" motions had already issued. The Panel designated Judge Charles R. Weiner of the Eastern District of Pennsylvania (who was a member of the Multidistrict Panel) to sit in the District of Minnesota for the purpose of conducting the pretrial proceedings.

Following the Panel's action, plaintiffs moved on June 22, 1981, for certification of a class almost identical to that denied certification by the transferor judge in his 1978 order. In support of their motion, plaintiffs offered only the rearranged affidavit used in support of the 1978 motion, which they did not even bother to update. They asserted no changes in circumstances or other reasons as a basis for departing from the transferor court's 1978 order.

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[4]The last plaintiff filed a tag-along complaint in the Northern District of Illinois on February 19, 1982.

[5]Plaintiffs sought consolidation in either the Northern District of Illinois or the Northern District of California; defendants requested consolidation in the District of Minnesota.

The transferee judge granted plaintiffs' motion on August 3, 1981. Opinion and Memorandum Order of Judge Weiner, Appendix F. That decision was reached only six working days after receipt by defendants of the material in support of plaintiffs' motion, without benefit of a hearing of the parties' position, briefing by the defendants, or a review of the record of the Minnesota action.* Similarly, the transferee judge's order did not address for reasons previously articulated by the transferor judge for denying class certification or refer to the prior orders of the transferor judge. Nor did the transferee judge cite additional facts or circumstances in support of his certification order.

The transferee judge denied a subsequent motion to vacate the class certification order on January 5, 1982. *In re Exterior Siding and Aluminum Coil Litigation*, 538 F. Supp. 45 (D. Minn. 1982), Appendix G. In that order, the judge expressly stated that his decision was not premised upon a finding of changed circumstances, but upon an independent exercise of his discretion under 28 U.S.C. § 1407. The judge explained:

> It is clear from the Act itself (28 U.S.C. § 1407) that class certification determinations are to be resolved by the transferee court free from the influence of any initial determinations of transferor courts.
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> * * *
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> That is not to say that in the exercise of our broad discretion, the prior decisions of our learned colleague Judge Alsop were ignored; . . . but it is to say that *this* Court, upon thorough consideration of the briefs and oral argument now before it, differed as to the result.

*The record had not yet been sent to Judge Weiner's chambers in Phila-

538 F. Supp. at 47, 48 (emphasis in original), Appendix G-4, G-5-6.

Defendants then petitioned the Court of Appeals for the Eighth Circuit for a writ of mandamus ordering the transferee court to vacate its class certification order.[7] On December 29, 1982, a 2-to-1 decision of a panel of that court directed that the writ be issued. *In re Exterior Siding & Aluminum Coil Antitrust Litigation*, 696 F.2d 613 (8th Cir. 1982), Appendix H. In deciding to issue the writ, the majority held that a transferee judge vacating an order of a transferor judge of the same court "only because the [transferee] judge 'differed as to the result,' and considered the issue to be within his discretion *alone*, so exceeds the sphere of that . . . discretionary power that it is a usurpation of power." *Id.* at 618 (emphasis in original).

A rehearing en banc was then granted, and the court of appeals divided 4-to-4 on March 28, 1983. *In re Exterior Siding & Aluminum Coil Litigation*, 1983 Trade Cas. ¶ 65,298 (8th Cir. 1983), Appendix I. The court's order, denying issuance of the writ, was entered without opinion. The dissent, however, published a brief statement of the basis for its conclusion that mandamus was warwanted:

> The transferee judge not only ignored the prior opinions of the transferor judge in certifying a class, but he certified a class infinitely broader than the one the plaintiffs had last requested be certified by the transferor judge. There is no record support for the broader class certified.

*Id.*

[7]Prior to submitting the petition, defendants sought to have the question certified for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). The transferee court, however, refused that request. *In re Exterior Siding & Aluminum Coil Litigation*, 538 F.Supp. at 49, Appendix G-9.

## REASONS FOR GRANTING THE WRIT

### I.

### The Proper Role of the "Law of the Case" Doctrine in Multidistrict Proceedings Under 28 U.S.C. § 1407 is an Important and Recurring Federal Question Which This Court Should Resolve.

This case dramatically illustrates the need for this Court's guidance in determining the circumstances in which a multidistrict transferee judge may vacate or modify the prior orders of a transferor judge under 28 U.S.C. § 1407. The present uncertainty among the lower courts encourages unnecessary relitigation and frustrates the statute's objective of efficient allocation of judicial resource and effective administration of justice. This Court's determination of the proper role of "law of the case" principles in proceedings under 28 U.S.C. § 1407 will discourage misuse of the multidistrict device and promote those purposes for which the statute was enacted.

#### A. The Lower Courts Have Not Developed a Consistent Rule for Applying Law of the Case Principles in Multidistrict Litigation.

Sound judicial administration demands that when an issue has been fully litigated, it should not be relitigated in the same case in the absence of "changed circumstances."[8]

Recognizing the validity of this principle, a number of federal courts have applied the "law of the case" doctrine

[8] "Changed circumstances" include "changes in the governing law, newly discovered evidence, or the manifest erroneousness of a prior ruling." *In re Multi-Piece Rim Products Liability Litigation*, 653 F.2d 671, 678 (D.C. Cir. 1981).

in appropriate cases.[8] The courts have found even such "inherently" nonfinal determinations as class certification orders appropriate subjects for the doctrine's application. *See, e.g., Sley v. Jamaica Water & Utilities, Inc.*, 77 F.R.D. 391 (E.D.Pa. 1977), and *Kramer v. Scientific Control Corp.*, 67 F.R.D. 98 (E.D. Pa. 1975), *appeal dismissed in part, rev'd in part on other grounds*, 534 F. 2d 1085 (3d Cir.), *cert. denied sub nom. Arthur Andersen & Co. v. Kramer*, 429 U.S. 830 (1976), where the court held that a class order should not be reversed, even by the same judge, without a showing of changed circumstances:

> While a class action determination is never irrevocable, *Seligson v. Plum Tree, Inc.*, 61 F.R.D. 343 (E.D. Pa. 1973), the proponents of revocation or modification of a class action Order should, at a minimum, show some newly discovered facts or law in support of their desired action. Defendants have not met that minimum. The grounds they list now include those which they gave previously or could have asserted earlier but did not.

67 F.R.D. at 99.

This relative certainty evaporates, however, in the context of consolidated multidistrict pretrial proceedings. The ad hoc determinations and ambivalent statements which characterize present case law are illustrated by *In re Upjohn Co. Antibiotic Cleocin Products Liability Litigation*, 664 F.2d 114 (6th Cir. 1981) and *In re Multi-Piece Rim*

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[8] *See, e.g., Hayman Cash Register Co. v. Sarokin*, 669 F.2d 162 (3d Cir. 1982); *Otten v. Stonewall Insurance Co.*, 538 F.2d 210 (8th Cir. 1976). Moreover, the courts have not hesitated to grant mandamus when a judge's failure to defer to the rulings of his predecessor in the same case is sufficiently serious. *See, e.g., Hayman Cash Register*, 669 F.2d 162; *ACF Industries, Inc. v. Guinn*, 384 F.2d 15, (5th Cir.), *cert. denied*, 390 U.S. 949 (1968).

*Products Liability Litigation*, 653 F. 2d 671 (D.C. Cir. 1981). In *Upjohn*, the court initially expressed some doubt as to whether "law of the case" was a "proper concept in this context," and declared that the doctrine "would not in all events control." 664 F. 2d at 120. In the same sentence, however, the court admitted that a transferee judge "ought *as a practical matter* to accord considerable deference to the judgment of the transferor court." *Id.*[9] In *Multi-Piece*, the court recognized at the outset that "law of the case" principles apply in multidistrict litigation. 653 F. 2d at 678. It tempered the effect of that recognition, however, adding: "sound exercise of the discretion implicit in [such principles] requires attention to the special authority granted the multidistrict transferee judge." *Id.*

The absence of a workable standard for applying the "law of the case" doctrine is the result of a tension between the usual principles of comity underlying the doctrine and the "special authority" of the multidistrict transferee court. Section 1407 vests in that court broad discretion. Yet, caught between a desire to avoid unnecessarily restricting the transferee court's flexibility and a reluctance to abandon "law of the case" principles in multidistrict proceedings, the courts have failed to develop appropriate limits on that authority. As a result, the transferee court's exercise of its discretion is virtually unguided, and meaningful appellate review is substantially impeded.

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[9] In similar fashion, the court stated that the power to revise discovery and protective orders was properly transferred to the transferee court during the period for which the court has responsibility for supervising ongoing discovery "[s]ince . . . both must necessarily be subject to continuing revision *upon change of circumstances*." 664 F.2d at 120 (emphasis added).

### B. The Existing Uncertainty Regarding the Role of The Law of the Case Doctrine Has Immediate and Serious Consequences for Multidistrict Litigation.

The indeterminate status of the "law of the case" is of prime, practical interest. The essentially ad hoc nature of present applications of the doctrine provides a strong incentive for disgruntled parties to relitigate unfavorable interlocutory decisions; this is especially true in the case of such significant issues as class certification questions. Given the increasing incidence and importance of multidistrict pretrial proceedings, that practice substantially and adversely affects both individual litigants and the judicial system.

#### 1. The Uncertainty Encourages Abuse of Multidistrict Proceedings and Substantially Undermines the Objectives of 28 U.S.C. § 1407.

Congress created in 28 U.S.C. § 1407 a system of procedures for coordinating and consolidating pretrial proceedings in "civil actions involving one or more common questions [and] pending in different districts." 28 U.S.C. § 1407(a). The system's components and rules manifest a clear intent to facilitate a sound allocation of judicial resources and the efficient conduct of the subject actions.[11]

The current absence of recognized limitations on the power of a transferee court to vacate or modify the prior

[11]Selection of a forum, for example, is guided by considerations of the "convenience of witnesses and parties" and the promotion of "just and efficient conduct" of the actions involved. 28 U.S.C. § 1407(a). *See also* Weigel, "The Judicial Panel on Multidistrict Litigation, Transferor Courts and Transferee Courts," 78 F.R.D. 575 (1977) (discussing the interrelated powers of the three components of the system).

orders of a transferor court presents a very real threat to the achievement of these objectives. As a practical matter, the prevailing uncertainty encourages the parties to attempt relitigation of any unfavorable decision. Such relitigation not only delays the final resolution of pretrial issues, but imposes unnecessary and substantial costs upon the parties and the judicial system.

This abuse of the multidistrict device and its attendant costs are amply demonstrated by this case. Here, plaintiffs, for the sole purpose of avoiding the rulings of the judge to whom the litigation was originally assigned, have burdened the judicial system with filings of redundant complaints; with motions, briefs, and oral argument before the Multidistrict Panel; and with relitigation, for the fourth time, of an issue that had been painstakingly resolved three years earlier.

Based on the belief that his discretion fas completely unfettered by prior rulings of the transferor judge, the transferee judge certified, on the basis of a virtually unchanged record, a class denied certification by the transferor judge three years earlier. As a result of that belief, the transferee judge ignored both the considerations detailed in the transferor judge's "painstaking," "well-reasoned' 'opinion, and the express intent of the Multidistrict Panel in selecting Minnesota as the transferee forum. In addition, he decided plaintiffs' motion without benefit of a hearing, briefing by petitioners, or even a review of the record in the five-year old Minnesota action.

The refusal of the transferee judge to apply the law of the case has rewarded plaintiffs' abuse of the multidistrict process. The result has been to defeat the primary purpose of the Multidistrict Panel to promote efficient use of judi-

cial resources. Such unwarranted manipulation of the multidistrict device clearly disserves the purposes for which 28 U.S.C. § 1407 was enacted. The costs and delays attending relitigation substantially encumber the efficient conduct of the proceedings. Moreover, reconsideration of the class certification question, without reference to the well-considered findings of the transferor court, irreparably wastes scarce judicial resources.

### 2. The Court of Appeals Failed to Exercise its Authority to Supervise the District Court and Prevent this Misuse of the Multidistrict Process.

Two of the three judges of the original panel of the Eighth Circuit that heard defendants' mandamus petition (and four of the eight Eighth Circuit judges sitting en banc) agreed with the Fifth Circuit's conclusion in *AFC Industries, Inc. v. Guinn*, 384 F.2d 15 (5th Cir. 1967), *cert. denied*, 390 U.S. 949 (1968), that unjustified disregard of the "law of the case" doctrine is an abuse of discretion and threat to sound judicial administration that justifies issuance of a writ of mandamus.

Although the four judges of the Eighth Circuit who voted to deny the writ of mandamus wrote no opinion, one of the principal arguments the dissenting judge in the original panel decision made against issuance of the writ was his conclusion that *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33 (1980), would deny a court of appeals discretion to issue a writ of mandamus in these circumstances. That conclusion fails to distinguish between mandamus to review the correctness of a class certification rul-

ing and mandamus to control a district judge who has wrongly assumed the power to disregard the law of the case.

The assumption that *Allied Chemical Corp.* denies the court of appeals discretion to issue a writ of mandamus here also ignores *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957), and the line of cases following *La Buy* that hold that appellate courts may issue writs of mandamus to supervise and preserve principles of sound judicial administration.

> [E]ven as restricted by *Will v. United States*, [389 U.S. 90 (1967) ], mandamus continues to play a vital role in the effective exercise of the jurisdiction of the courts of appeals. It continues to be necessary, of course, to prevent district judges from embarking on frolics of their own. Thus it has recently issued . . . to prevent a judge from vacating an order entered by another when no change in the circumstances appeared. . . .
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> In addition to its use as a check upon judicial misbehavior, . . . it may be used as an instrument to promote economical, even, and orderly administration of justice within the circuit. . . . In *La Buy v. Howes Leather Co.*, the Supreme Court, rejecting the view that a court of appeals could review by mandamus only an order that frustrated its appellate jurisdiction, concluded: 'We believe that supervisory control of the District Court is necessary to proper judicial administration in the federal system.'

9 Moore's Federal Practice ¶ 110.28, pp. 309-312. *Cf. Moses H. Cone Memorial Hospital v. Mercury Construction Co.*, 103 S.Ct. 927 (1983).

Judge Weiner's usurpation of power here is analogous to a trial court's refusal to conform to an appellate court's mandate or clearly expressed direction. That refusal has consistently been held to be a proper basis for mandamus. *See, e.g., United States v. Haley*, 371 U.S. 18 (1962); *United States v. Ritter*, 273 F. 2d 30 (10th Cir. 1959), *cert. denied*, 362 U.S. 950 (1960). Also, mandamus has been held to be an appropriate tool to supervise lower courts in class certification situations. *See, e.g., Schmidt v. Fuller Bruch Co.*, 527 F. 2d 532 (8th Cir. 1975); *McDonnell Douglas Corp. v. U.S. Dist. Court, C.D. of Cal.*, 523 F. 2d 1083 (9th Cir. 1975).

Although the Multidistrict Panel did not expessly direct Judge Weiner to apply the law of the case, its decision clearly anticipated that he would do so. One of the principal reasons for the Panel's decision to consolidate the cases in the District of Minnesota was that ". . . on balance we are persuaded that the District of Minnesota is the appropriate transferee forum because the action there is most advanced. The Minnesota action has been pending in that district for over five years. *Rulings have been made on* amendments to the complaint, discovery issues, a non-communication order, *class certification motions*, and other matters." Transfer Order, Appendix E-2. (Emphasis added.)

These very "rulings . . . on . . . class certification motions," which involved the most extensive record and required the most attention of Judge Alsop, were promptly ignored by the new judge, thereby defeating the efficiency sought by the Multidistrict Panel in retaining the cases in the District of Minnesota.

### 3. The Present Confusion Increases the Potential for Misuse of Class Actions.

The certification of a plaintiff class is a matter of particular importance, especially in large antitrust actions. As this Court has recognized, certification of a large class may substantially increase defendants' litigation costs. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978). Moreover, because damages in antitrust actions are subject to trebling, the certification of such a class vastly enlarges defendants' potential liability. The obvious impact of such increased exposure[11] provides substantial incentive to seek certification of the largest possible class, whether or not warranted, in order to maximize potential damages or settlement recovery and attendant attorneys' fees.[12]

The present uncertainty regarding the role of the "law of the case" doctrine in multidistrict proceedings facilitates such misuse of the class action. Given the large financial stakes, few plaintiffs will forsake an opportunity to relitigate an adverse class certification decision.

Until the Supreme Court gives the lower courts guidance as to the kinds of presumptions Judge Weiner and other judges regularly apply to justify automatic certification of plaintiff classes in any cases alleging price-fixing violations of Section 1 of the Sherman Act, the assignment of judges will continue to be a multimillion dollar roll of the dice in antitrust class action cases. *Compare, e.g., Windham v. American Brands, Inc.*, 68 F.R.D. 641, 651 (D.S.C. 1975),

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[11] As this Court commented in *Livesay:* "Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." 437 U.S. at 476.

[12] *See, e.g.*, Taylor, *A Lawyers' Fee-for-All: $610 An Hour?* Wash. Post, Apr. 10, 1983 at C. 1, Col. 3.

*aff'd*, 565 F.2d 59 (4th Cir. 1977) (en banc), *cert. denied*, 435 U.S. 968 (1978), with *Robertson v. National Basketball Association*, 389 F. Supp. 867, 902 (S.D.N.Y. 1975). This guidance is essential to curb the increasing misuse of class actions and multidistrict jockeying by plaintiffs seeking redeterminations of adverse class action rulings.

The obvious adverse effects of this misuse are illustrated by the present case. Through filing new lawsuits plaintiffs were able to secure relitigation and certification of the first and largest of the three classes for which they sought certification—a nationwide class of purchasers of siding and aluminum siding coil. Despite the lack of record support for that class, petitioners will be forced to expend substantial amounts in discovery and litigation costs and exposed to significantly increased potential liability.

In reality class action orders are often dispositive of the litigation. The denial of class certification is, in some cases, the "death knell" for plaintiffs' interest in pursuing the litigation. The certification of a broad class so greatly increases the costs of defense and the potential exposure to damages in most antitrust cases that if a broad class is certified, at least some defendants will almost invariably settle the case on terms that will bring plaintiffs' counsel sufficient legal fees to reward them for their efforts. Because the standards applied in deciding whether to certify a class have such enormous consequences—to defendants' exposure, to the likelihood of a sizeable fund for payment of plaintiffs' lawyers' fees, and to the number of class action cases that will be filed in the courts—a clear statement of those standards from the Supreme Court would correct the random and inconsistent access to justice that now prevails for litigants in class action cases.

## III.

### This Court Should Resolve the Undetermined Question of the Effect of an Equally Divided Vote by an Appellate Court Sitting En Banc.

Although this Court has not ruled on the question and although there is no general federal rule, the Eighth Circuit treated its equally divided en banc decision as a denial of defendants' mandamus petition. The result is contrary to the legal principle that an equally divided court affirms the outstanding judgment—in this case the panel decision—by operation of law. *See Carmichael v. Eberle*, 177 U.S. 63 (1900); *Best Co. v. Maxwell*, 217 N.C. 134, 6 S.E. 2d 893, *judgment on the merits rev'd*, 311 U.S. 454 (1940); *Florida Motor Lines v. Hill*, 126 Fla. 586, 143 So. 261 (1931); Annot. 131 A.L.R. 1011 (1941). *See also, Miroyan v. United States*, 439 U.S. 1338, 1341-42 (1978), commenting upon *United States v. Holmes*, 537 F. 2d 227 (5th Cir. 1976) and *Bishop v. Wood*, 426 U.S. 341 343 n.3 (1976), *affirming* 498 F. 2d 1341 (4th Cir. 1974), where comments of this Court indicate that equally divided en banc courts of appeals affirmed the Panels' decisions.

The result reached by the Eighth Circuit Court of Appeals in the present case—that an equally divided en banc decision affirms the decision of the district court—is even more anomalous because the matter came before the court upon petition for writ of mandamus rather than upon appeal. Mandamus is an original proceeding in the appellate courts; the panel's decision constituted the only existing decision with respect to the mandamus petition. Thus the decision that the Eighth Circuit was reviewing en banc was not the decision of the district court granting class certifi-

cation, but rather the decision of the Eighth Circuit panel granting a writ of mandamus. Under the general rule that when an appellate court is equally divided the outstanding judgment is, by operation of law, affirmed, the decision of the Eighth Circuit en banc here should have resulted in affirmance of the panel's decision and issuance of a writ of mandamus.

Only rarely have United States courts of appeals directly addressed the effect of equally divided en banc decisions. Those few courts of appeals have disagreed on whether an equally divided en banc decision affirms the panel's decision. *See Bishop v. Wood*, 498 F. 2d 1341 (4th Cir. 1974), *aff'd*, 426 U.S. 341 (1976). *Contra, Drake Bakeries, Inc. v. Local 50, American Bakery & Confectionery Workers International, AFL-CIO*, 370 U.S. 254, 255 N.1 (1962), *aff'g* 294 F. 2d 399 (2d Cir. 1961). *See also United States v. Mandel*, 591 F. 2d 1347 (4th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980); *United States v. Walden*, 458 F. 2d 36 (4th Cir. 1972); *Pennsylvania v. Local Union 452, International Union of Operating Engineers*, 648 F. 2d 923 (3d Cir. 1981) *rev'd and remanded sub nom. General Building Contractors Association v. Pennsylvania*, 102 S. Ct. 3141 (1982).[14]

Lacking express guidance from this Court, then, the present situation with respect to the effect of equally divided en banc decisions of federal appellate courts is one of confusion and uncertainty. While a few courts of appeals have adopted local rules in an attempt to deal with the issue,[15] most have neither articulated a rule nor the reasoning

[14]Both *Mandel* and *Walden* involved appeals in criminal cases.

[15]The Sixth Circuit has adopted a local rule (presently Rule 14(a)) which states that the effect of the grant of a rehearing en banc is to vacate the panel decision and restore the case to the docket as a pending ap-

behind it. The Eighth Circuit Court of Appeals has no local rule on the effect of an equally divided en banc decision.

The issue presented is of substantial importance to the administration of judicial business in all of the circuits, as well as to the parties before the Court.[16] Litigants should know the effect of an equally divided en banc decision at the time rehearing is considered. Inasmuch as a petition for rehearing is an ex parte proceeding,[17] the granting of the ex parte application should not produce a complete vacation of the previous judgment of reversal by the appellate court. *Cf. Florida Motor Lines v. Hill,* 126 Fla. 586, 143 So. 261 (1931).

## CONCLUSION

The practice allowed here substantially and adversely affects both the parties before the courts and the judicial system. Fairness to individual litigants and the integrity of

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peal. Under that rule, the equally divided en banc decision presumably has the effect of affirming the lower court, under the general rule that by operation of law an equally divided court affirms the outstanding judgment. The Fifth Circuit, in local Rule 17, and the Eleventh Circuit, in local Rule 26(i), have adopted similar local rules providing that the effect of granting a rehearing en banc is to vacate the panel opinion and judgment and to stay the mandate.

[16] The importance of an issue to the administration of the federal courts has been cited by this Court as a ground for accepting certification of a question of law pursuant to 28 U.S.C. § 1254(3). *Moody v. Albermarle Paper Co.,* 417 U.S. 622, 624, 41 L.Ed.2d 358, 360 (1974) (question whether a senior judge, who had been on the original panel hearing the case and therefore was eligible to vote on the merits of an en banc rehearing, could also vote on whether to rehear the case en banc). That factor would be no less compelling in considering whether to hear a matter presented to the Court by petition for writ of certiorari. *See Shenker v. Baltimore & Ohio Railroad Co.,* 374 U.S. 1 (1963); *United States v. American-Foreign Steamship Corp.,* 363 U.S. 685 (1960).

[17] In the instant case, the Eighth Circuit Court of Appeals did not request briefing from defendants on plaintiffs' petition for rehearing en banc. Consequently, defendants were not heard on whether the Eighth Circuit should rehear the case.

the multidistrict and class action devices requires this Court to define the role of law of the case principles in miltidistrict proceedings. Similarly, this Court's regard for sound judicial administration requires its resolution of the existing uncertainty regarding the effect of an equally divided en banc decision.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix A

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United States District Court
District of Minnesota
Fourth Division

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Hoyt Construction Company, Inc.; Minnesota Exteriors, Inc.; on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

Alside, Inc.; Alcan Aluminum Corporation; Aluminum Company of America; Bethlehem Steel Corporation; Kaiser Aluminum and Chemical Corporation; Kaiser Aluminum and Chemical Sales, Inc.; Mastic Corporation; Reynolds Metals Co.; Revere Copper & Brass, Inc.; United States Steel Corporation,

Defendants.

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Memorandum Order

4-75 Civ. 257

August 24, 1978

This matter comes before the court upon the motion of the plaintiffs Hoyt Construction Company, Inc. ("Hoyt") and Minnesota Exteriors, Inc. ("Exteriors") for certification of this action as a class action and of themselves as representatives of a class of plaintiffs consisting of:

All persons, firms, corporations or other entities in the United States (except defendants and their wholly-owned business entities) who purchased directly from one or more of the defendants exterior metal siding and related building products and accessories at any time after June 3, 1971, or aluminum coil therefor or therein at any time after November 9, 1971.

Procedural History

On June 4, 1975, Hoyt and Exteriors commenced this action. Their complaint alleged that the defendants conspired with each other and with others to restrain commerce in exterior siding and related building product accessories and that the defendants monopolized and attempted to monopolize such commerce. Exteriors also alleged that the defendant Alside, Inc. ("Alside") tortiously interfered with Exteriors' contractual relationships with others. On November 11, 1975, Hoyt and Exteriors moved for leave to amend their complaint. On June 23, 1976, Hoyt and Exteriors filed their first amended complaint. That complaint asserted additional claims of conspiracy, monopolization and attempt to monopolize in connection with commerce in aluminum coil used in or for exterior siding and related building products and accessories. On December 21, 1977, Hoyt and Exteriors filed a second amended complaint. That complaint deleted claims based on indirect purchases from the defendants.

Background

Hoyt, a Minnesota corporation with its principal place of business at Bloomington, Minnesota, purchases exterior siding and related building products and accessories that

in most instances have been pre-treated, pre-painted and pre-formed by a siding manufacturer. Hoyt then applies the siding and related products and accessories to various structures pursuant to contracts with the owners of the structures or pursuant to subcontracts. When Hoyt is unable to match a pre-formed or pre-painted product to the requirements of a particular job, it "bends up" or paints the item needed using standardized stock. Exteriors, a Minnesota corporation with its principal place of business at Wayzata, Minnesota, also purchases siding and related building products and accessories and applies them to structures pursuant to contracts entered into by Exteriors and the structures' owners.

Neither Hoyt nor Exteriors is itself a manufacturer or end-user of siding or related building products or accessories. Both deal primarily in aluminum siding, and both operate primarily in the residential market.[1] Both Hoyt and Exteriors have purchased relatively small amounts of exterior siding and related building products for resale on a "materials only" basis.[2] In sum, it can fairly be said that Hoyt and Exteriors are primarily engaged in the application of residential aluminum siding and related products and accessories in the area immediately surrounding Minneapolis/St. Paul.

Alside is a Delaware corporation with its principal place of business at Akron, Ohio. It is a manufacturer of residential aluminum and steel siding and related building products, a wholesaler of aluminum, steel, vinyl and fiber-

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[1]Hoyt has done some commercial work, and Exteriors does occasional commercial and agricultural jobs.

[2]Independent Distributing & Manufacturing Company ("IDM"), a separate corporation owned by Bruce Hoyt, the principal owner of Hoyt, once operated as a wholesaler of siding and related building products and accessories. However, IDM is not a party to this action.

glass siding and related building products and an applicator of those products. A company affiliated with Alside manufactures fiberglass siding.

The defendant Alcan Aluminum Corporation ("Alcan") is a New York corporation with its principal place of business at Cleveland, Ohio. It is a producer of aluminum mill products, a manufacturer of aluminum siding and related building products and a wholesaler of aluminum and vinyl siding and accessories. A Canadian corporation affiliated with Alcan produces virgin aluminum ingot.

The defendant Aluminum Company of America ("Alcoa") is a Pennsylvania corporation with its principal place of business at Pittsburg, Pennsylvania. It is a producer of aluminum ingot and aluminum mill products, a manufacturer of aluminum and vinyl siding and related building products and a wholesaler[3] of aluminum and vinyl siding.

The defendant Bethlehem Steel Corporation ("Bethlehem") is a Delaware corporation with its principal place of business at Bethlehem, Pennsylvania. It is a producer of steel and steel products; it does not produce or distribute aluminum ingot or aluminum mill products, nor does it manufacture or distribute exterior siding or related building products.

The defendant Kaiser Aluminum and Chemical Corporation ("Kaiser") is a Delaware corporation with its principal place of business at Oakland, California. The defendant Kaiser Aluminum and Chemical Sales, Inc. ("Sales") is a California corporation with its principal place of business at Oakland, California. Kaiser is a producer of aluminum ingot and aluminum mill products and

[3]Alcoa's wholesaling activities are carried on through Alcoa Building Products, Inc., an Alcoa subsidiary.

a manufacturer of aluminum siding and related building products. It sells the items which it produces to Sales. Sales is a wholesaler of the aluminum siding and related products which it purchases from Kaiser.

The defendant Mastic Corporation ("Mastic") is an Indiana corporation with its principal place of business at South Bend, Indiana. Mastic is a wholly owned subsidiary of Bethlehem. Mastic manufactures and distributes vinyl and asbestos siding and related building products; it also purchases and resells at wholesale steel and aluminum siding.

Reynolds Metals Company ("Reynolds") is a Delaware corporation with its principal place of business at Richmond, Virginia. Reynolds is a producer of aluminum ingot and aluminum mill products, a manufacturer of aluminum siding and related building products and a distributor of those products. It also distributes vinyl siding manufactured by others. In addition, Reynolds is an applicator of exterior siding.

United States Steel Corporation ("U.S.S.") is a Delaware corporation with its principal place of business at Pittsburg, Pennsylvania. U.S.S. is primarily engaged in the business of producing and marketing steel products, including steel siding and related building products. U.S.S. produces no aluminum product nor any type of siding other than steel. U.S.S. does purchase and resell aluminum coil which is suitable for use in the fabrication of siding or related building products.

Thus, it is undisputed that all of the defendants except Bethlehem are involved in the business of distributing metal siding and related building products. However, it is also undisputed that the extent of the involvement varies

from defendant to defendant. Some defendants produce the raw materials from which metal siding and related building products are manufactured; others do not. All of the defendants[4] except Bethlehem and Mastic manufacture either aluminum or steel siding, but none manufactures both. All of the defendants except Bethlehem wholesale either aluminum or steel siding or both; some also wholesale other types of exterior siding. Two of the defendants also act as siding applicators; the others do not. Although all of the defendants operate in trading areas in which other defendants also operate, all of the defendants do not operate in all trading areas.

Moreover, to describe operations of Hoyt and Exteriors and of the defendants is not to describe the entire siding industry. First, it is clear that materials other than the ones manufactured and distributed by the defendants are sold and applied as exterior siding. Wood, hardboard, fiberglass, stucco and brick, as well as aluminum, steel, vinyl and asbestos, are employed as exterior siding materials. Second, entities other than the defendants are involved in those aspects of the exterior siding industry in which the defendants are active. There are fourteen other corporations that operate aluminum mills that produce the aluminum coil from which siding and related building products can be made, there are twenty-five other manufacturers of aluminum siding, five other manufacturers of steel siding and eight other manufacturers of vinyl siding; and there are many other wholesalers and applicators. Finally, the demand for each of the various types of siding

[4]Because the parties have at times failed to distinguish Kaiser from Sales, the two corporations will be treated as one entity for the purpose of this motion.

varies from trading area to trading area because of varying climatic conditions, consumer preferences and marketing efforts.

Class Action Prerequisites

It is well settled that the proponents of class certification are required to establish that the requirements of Rule 23(a), Fed.R.Civ.P., have been met. *E.g., Turchin v. Butz*, 405 F. Supp. 1263, 1267 (D. Minn. 1976); 7 C. Wright & A. Miller, *Federal Practice & Procedure* § 1759 (1972). At the outset, Rule 23 (a) requires Hoyt and Exteriors to demonstrate (1) that the class is so numerous that joinder of all members is impracticable, (2) that there are questions of law or fact common to the class, (3) that the claims of the representative parties are typical of the claims of the class and (4) that the representative parties will fairly and adequately represent the interest of the class.

Numerosity

The question of what constitutes impracticability of joinder depends upon the facts of each case. 7 C. Wright & A. Miller, *Federal Practice & Procedure* § 1762 (1972). Two of the factors to be considered in determining impracticability are the number of members in the proposed class and their geographical dispersion. *See Boyd v. Ozark Air Lines, Inc.*, 568 F.2d 50 (8th Cir. 1977). It is virtually beyond dispute that the members of the nationwide class which Hoyt and Exteriors propose to represent are so numerous and so widely dispersed that their joinder would be impracticable.

The nationwide character of the proposed class makes the dispersion of its members readily apparent. It also seems to be conceded that the members of such a class would number in the thousands or the tens of thousands. Such a class would encompass all of the non-defendant siding manufacturers that purchased aluminum coil from any of the defendants for incorporation into the siding and related building products which they manufacture, all of the independent wholesalers, dealers and contractors who purchased aluminum or steel siding from any of the defendants for resale and all of the builders, homeowners, farmers and businessmen who contracted with any of the defendants for the application of aluminum or steel siding to structures which they were erecting or remodeling.

Commonality

The existence of questions of law and fact common to the proposed class is equally clear. The common questions revolve around the defendants' alleged violations of the Sherman Act and the existence of a conspiracy to monopolize, the attempt to monopolize and to restrain interstate trade in metal siding *See, e.g., Windham v. American Brands, Inc.*, 68 F.R.D. 641 (D.S.C. 1975), *aff'd*, 565 F.2d 59 (4th Cir. 1977); *Minnesota v. United States Steel Corp.*, 44 F.R.D. 559 (D. Minn. 1968).

Typicality

Although Hoyt and Exteriors do assert claims which undeniably involve questions of law and fact common to the proposed class, it does not necessarily follow that those claims and the defenses thereto are *ipso facto* typical of the claims and defenses to be litigated if a class similar or iden-

tical to the one proposed by Hoyt and Exteriors were to be certified. In order to be typical the claims of the class representatives and the defenses thereto need not mirror the claims of all members of the class or the defenses to those claims; however, the claims of the class representatives cannot be considered typical if the legal and factual position of the putative representative differs markedly from that of the class members. *See, e.g., Pendleton v. Schlesinger,* 73 F.R.D. 506 (D.D.C. 1977); *Minnesota v. United States Steel Corp., supra.* Because the court finds that there are marked differences between the legal and factual position of Hoyt and Exteriors and the positions of other members of the proposed class, the court concludes that Hoyt and Exteriors have not satisfied the typicality requirement of Rule 23(a).

By seeking to represent persons and entities as diverse as aluminum siding manufacturers and homeowners, Hoyt and Exteriors are attempting to assert claims of class members whose legal and factual positions differ markedly both from the position of Hoyt and Exteriors and from each other. First, it is clear that the factual position of Hoyt and Exteriors differs markedly from the positions of other members of the proposed class. The roles of Hoyt and Exteriors as links in the chain of distribution are limited to those of dealer/applicators of residential aluminum siding in the Minneapolis/St. Paul area. Hoyt and Exteriors purchase siding and related building products either from the defendants, from other manufacturers or from independent wholesalers. Neither aluminum siding manufacturers nor homeowners play similar roles. The only items that a siding manufacturer would normally purchase from any of the defendants are aluminum mill products. That

siding manufacturer would be likely to compete with some of the defendants in order to make sales to dealer/applicators such as the plaintiffs and to wholesalers from whom the plaintiffs may make purchases. On the other hand, a homeowner would normally enter into a contract both for the sale of siding and for its application. Such a contract would rarely apply to more than one structure. In the case of the homeowner, there might well have been competition between the plaintiffs and some of the defendants to gain the homeowner's business. Likewise, it is clear that the legal position of Hoyt and Exteriors differs markedly from the positions of other members of the class. The complaint alleges that the defendants conspired with others to violate the Sherman Act. It seems apparent that those most likely to have acted as co-conspirators would be other siding manufacturers and other wholesalers or applicators, all of whom would be members of the proposed class if they had made purchases from any of the defendants. Moreover, it seems beyond dispute that the defendants are privileged to assert a "consumer" defense to the claims asserted by homeowners, a defense that would be of no avail against claims asserted by Hoyt and Exteriors and others who claim to have suffered competitive injury. *See Reiter v. Sonotone Corp.*, —— F.2d —— (8th Cir. 1978).

Adequacy

The adequacy of Hoyt and Exteriors as representatives of the proposed class depends upon (1) whether the interests of Hoyt and Exteriors are co-extensive with the interests of the other members of the class, (2) whether their interests are antagonistic in any way to the interests of

those whom they seek to represent, (3) the proportion of those made parties as compared with the total membership of the class, and (4) any other facts bearing on the ability of Hoyt and Exteriors to speak for the other members of the class' 3B J. Moore, *Federal Practice* ¶ 23.07 (2d ed. 1977). Because the court finds that the interests of Hoyt and Exteriors do not extend as far as and are antagonistic to the interests of some members of the proposed class, the court concludes that Hoyt and Exteriors will not adequately represent the interests of the proposed nationwide class of siding manufacturers, wholesalers, applicators and end-users.

The requirement that a class representative's interests be co-extensive with the interests of the class has at least two purposes. First, the requirement is intended to insure that no claim will be asserted by a person who lacks standing to assert the claim. *See, e.g., Jacobs v. Martin Sweets Co.*, 550 F.2d 364 (6th Cir. 1977). Second, the requirement helps to guarantee the vigorous prosecution of the action and the protection of the rights of the absent class members. 7 C. Wright and A. Miller, *Federal Practice & Procedure* § 1966 (1972).

Hoyt and Exteriors contend that they are proper representatives of a class that would include aluminum siding manufacturers because they have purchased aluminum coil which they then incorporated into aluminum siding and related building products. Although it is true that Hoyt and Exteriors have made some purchases of aluminum

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'The defendants challenge neither resources of Hoyt and Exteriors to finance the conduct of this litigation adequately nor their attorneys' experience or ability to manage litigation of the type, complexity and magnitude presented here.

coil which they formed into trim, flashing and gutters,[6] it is clear both that Hoyt and Exteriors have never purchased aluminum coil suitable for incorporation into siding[7] and that they are not "manufacturers" of siding or related building products.[8] Therefore, the court is of the opinion that Hoyt and Exteriors lack standing to assert a claim that the defendants conspired to monopolize, to attempt to monopolize or to restrain interstate commerce in aluminum coil for use in the manufacture of siding. In addition, the court finds that Hoyt and Exteriors will have little, if any, interest in any recovery which would flow to aluminum siding manufacturers. Therefore, the court is of the opinion that the interests of Hoyt and Exteriors are not sufficiently co-extensive with the interests of siding manufacturers to guarantee that Hoyt and Exteriors will prosecute this action vigorously on behalf of the siding manufacturers.[9] *See Simon v. Westinghouse Elec. Co.*, 73 F.R.D. 480 (E.D. Pa. 1977).

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[6]Hoyt and Exteriors only form trim and other related building products from coil when they are unable to match a pre-formed product to the requirements of a particular job.

[7]IDM did make two purchases of aluminum coil suitable for use in manufacturing siding. However, both purchases were in very small amounts. In any event, it seems clear that IDM was never a "manufacturer" of aluminum siding or related building products. *See* n.8, *infra*.

[8]A typical aluminum siding manufacturer purchases coil in large unpainted rolls. The manufacturer then chemically treats, paints and dries the aluminum sheet. Subsequently, the manufacturer may emboss the sheet and will cut it to a desired width, bend it to the desired shape, cut it to the desired length and pack the finished siding into cartons. Related building products and accessories are manufactured in a similar fashion. Neither Hoyt nor Exteriors has the equipment nor the other facilities necessary to carry on such a manufacturing operation.

[9]The plaintiffs suggest that "there is no question that [their attorneys] will capably and vigorously assert and prosecute the claims of the [entire] class." Even if the court were to assume the truth of what the plaintiffs suggest, the problem presented by the fact that the interests of the plaintiffs and the interests of siding manufacturers are diver-

Likewise, the interests of Hoyt and Exteriors are also clearly not co-extensive with the interests of the end-users whom the plaintiffs seek to represent. It is clear that Hoyt and Exteriors themselves are not and never have been end-users; in fact, the only basis on which Hoyt and Exteriors purport to include end-users within the proposed class is that both Hoyt and Exteriors and end-users purchased siding from one or more of the defendants. However, it is clear that neither Hoyt nor Exteriors would share in any recovery which might eventually flow to end-users. Thus, there is no assurance[10] that the claims of the end-users will not be abandoned or compromised on terms detrimental to the interests of the end-users. Therefore, the court is of the opinion that Hoyt and Exteriors should not be permitted to represent end-users.

Moreover, the court concludes that the limited involvement of Hoyt and Exteriors in the agricultural and commercial siding markets precludes their being allowed to represent a class which would include such persons. It is clear that Hoyt and Exteriors do purchase and apply some commercial and agricultural siding; however, it is also clear that the primary focus of the operations of both Hoyt and Exteriors is the residential siding market. The court is well aware that in some circumstances an individual with a very modest financial interest in the outcome of an action brought on behalf of a class which seeks very substantial damages may serve as an adequate representative of the class. *See, e.g., Eisen v. Carlisle & Jacquelin,* 391 F.2d 555

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gent would not be obviated because it is well settled that the zeal and competence of an attorney or the attorney's client cannot transform either the attorney or the client into a member of a class to which neither the attorney nor the client otherwise belong. *See, e.g., La Mar v. H & B Novelty & Loan Co.,* 489 F.2d 461 (9th Cir. 1973).

[10] *Id.*

(2d Cir. 1968), *on remand*, 52 F.R.D. 253 (S.D.N.Y. 1971), 54 F.R.D. 565 (S.D.N.Y. 1972), *rev'd*, 479 F.2d 1005 (2d Cir. 1973), *vacated*, 417 U.S. 156 (1974). However, even though such a person may well be an appropriate and adequate representative of a class whose members all possess relatively small claims, the court does not consider a person with a relatively small claim to be an adequate representative of a class that includes persons with much larger claims. *Cf. San Antonio Tel. Co. v. American Tel. & Tel. Co.*, 68 F.R.D. 435 9 (W.D. Tex. 1975). Because it is obvious that there are persons with much larger stakes in the claims of the proposed class as they relate to agricultural and commercial siding, the court concludes that the stake of Hoyt and Exteriors is insufficient to insure a vigorous prosecution of those claims.

In addition, it appears that the interests of some members of the class are inherently antagonistic to the interests of Hoyt and Exteriors. In order to recover on the claims of an aluminum siding manufacturer it would be necessary for a class representative to prove the existence of a conspiracy to fix the prices charged for aluminum coil used to manufacture siding and related building products. However, in order for Hoyt and Exteriors to maximize their recoveries it would be necessary for them to prove that the defendants and other aluminum siding manufacturers conspired to fix the prices of siding and related building products. It might well reduce any recovery to Hoyt and Exteriors if they were to prove the existence of a conspiracy to fix only the price of aluminum coil. Thus, the self-interest of Hoyt and Exteriors would militate against any attempt to prove what is absolutely essential to any recovery by the aluminum siding manufacturers who are members of the pro-

posed class, and it would motivate Hoyt and Exteriors to attempt to join and to recover from those same manufacturers. Such self-interest is clearly antagonistic to the interests of the siding manufactuers whom Hoyt and Exteriors seek to have included in the class they ask the court to certify. Likewise, in order to maximize any recovery which might flow to the end-users who are members of the proposed class it would be beneficial to join all siding applicators, including Hoyt and Exteriors, as defendants and to prove that all those persons had engaged in a conspiracy to fix the prices of siding and related building products and of their application. Of course, the self-interest of Hoyt and Exteriors dictates that they avoid being joined as defendants and that no such conspiracy be proven. Clearly, such self-interest is also antagonistic to the interests of the end-users whom the plaintiffs seek to represent. Finally, one of the elements of the claim that the defendants conspired to monopolize, to attempt to monopolize and to restrain trade in siding and related building products is an allegation that the defendants engaged in price discrimination. It is clear that any applicator or wholesaler who received an unjustified discount would not be injured and that anyone whose competitor received such a discount and who did not himself receive the discount would be injured and entitled to recover for his injury. It is clear that Hoyt and Exteriors did receive certain discounts. Therefore, they have no interest in proving that a competitor was injured by any discount which they themselves received. Thus, the interests of Hoyt and Exteriors are antagonistic to the interests of those wholesalers and applicators who may have been the victims of the price discrimination alleged. *See, e.g., Shaw v. Mobil Oil Corp.*, 60 F.R.D.

566 (D.H.H. 1973); *Hettinger v. Glass Speciality Co.*, 59 F.R.D. 286 (N.D. Ill. 1973).

Hoyt and Exteriors vigorously assert their adequacy to serve as representatives of the proposed class and urge the court to reject the challenges to their adequacy. In the alternative, Hoyt and Exteriors suggest that the court should certify the proposed class now and at some later date should remedy any deficiency in their representation by the creation of subclasses and the appointment of representatives for those subclasses. Although the court has the power to divide a class into subclasses in order to remedy problems which arise subsequent to certification, Rule 23(c) (4) (B), Fed. R. Civ. P., it is clear that the court may never permit a litigant who the court knows to be an inadequate representative of the class because he or she is not a member of the class at the time the class action is certified to serve as a representative of that class. *Sosna v. Iowa*, 419 U.S. 393 (1975). Likewise, the court is of the opinion that it may not certify a person whom the court knows to have interests antagonistic to the interests of other members of the class he or she seeks to represent as a representative of the class.

Class Action Maintainability

Even if this action and the proposed class and its representatives were to satisfy the prerequisites of Rule 23(a), Fed. R. Civ. P., it would also be necessary for the action to meet the criteria set out in Rule 23(b) (3), Fed. R. Civ. P. Rule 23(b) (3) provides in pertinent part:

> An action may be maintained as a class action if . . . the court finds that the question of law or fact common to the members of the class predominate

over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interests of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Predominance

Because common questions of law and fact do exist, the issue before the court is whether or not such questions predominate. There is no ready quantitative or qualitative test for determining whether the common questions satisfy the test of Rule 23(b) (3), but it is clear that the court is under a duty to evaluate the relationship between the common and the individual questions. 7A C. Wright & A. Miller, *Federal Practice & Procedure* § 1778 (1972).

The plaintiffs suggest that it is almost axiomatic that allegations of conspiracy to violate the antitrust laws satisfy the predominance requirement. *See, e.g., Robertson v. National Basketball Ass'n,* 389 F. Supp. 867, 902 (S.D N.Y. 1975). *Illinois v. Harper & Row Publishers, Inc.,* 301 F. Supp. 484 (N.D. Ill. 1969). However, although antitrust actions are often suited to class action treatment, the mere allegation that a conspiracy to violate the antitrust laws existed does not insure that common questions pre-

dominate. *Windham v. American Brands, Inc., supra* at 651.

It is true that there is virtual unanimity of opinion that common questions relating to liability predominate in antitrust cases which are premised solely upon claims of conspiracy to raise prices to noncompetitive levels and which permit a mechanical computation of damages. Such cases seem particularly well suited to class action treatment. *See, e.g., Blackie v. Barrack,* 524 F.2d 891 (9th Cir. 1975), *cert. denied,* 429 U.S. 816 (1976); *Illinois v. Harper & Row Publishers, Inc.,* 301 F. Supp. 484 (N.D. Ill. 1969), *aff'd by an equally divided court,* 400 U.S. 348 (1971). However, it is also true that common questions relating to liability do not predominate in other types of antitrust action. In some of those actions proof relating to the issue of liability is necessarily highly individualistic. *See e.g., Bow Hall v. Metropolitan Tobacco Co.,* 74 F.R.D. 142 (E.D. N.Y. 1977); *Chmieleski v. City Products Corp.,* 71 F.R.D. 118 (W.D. Mo. 1976). In other actions damages are incapable of computation in any mechanical fashion, and proof of the amounts of individual claims is required. *See, e.g., Newberry v. Washington Post Co.,* 71 F.R.D. 25 (D.D.C. 1976); *Windham v. American Brands, Inc., supra.*

Even if the court were to determine that questions relating to liability did predominate, it is clear that much of the evidence would relate to less than the proposed class as a whole. Evidence relating to fixing the price of siding which certain of the defendants contracted to apply to homes, commercial buildings and farm structures would have no relevance to the claims asserted on behalf of aluminum siding manufacturers. Likewise, evidence relating to fixing the price of steel siding would have little if any

relevance to the claim of a homeowner who contracted to have aluminum siding applied to his home. Thus, it becomes clear that the inclusion of persons and entities at various levels in the chain of distribution creates additional individual questions.

Moreover, Hoyt and Exteriors are asserting some claims solely on their own behalf and not on behalf of other members of the proposed class. The claims of Hoyt and Exteriors relate to aluminum coil and to *all* types of exterior siding and related building products; the claims of the proposed class relate only to aluminum coil and to *metal* siding and related building products. Exteriors also asserts an individual claim of tortious interference with contract. It seems beyond dispute that these separate claims present individual rather than common questions.

Finally, some of the claims asserted on behalf of the proposed class require individualized proof as to liability, as to damages or as to both. First, it seems that the claim that the defendants fraudulently concealed their alleged violations requires proof that each class member failed to discover facts suggesting a possible claim until a time within four years of the filing of the complaint, that due diligence would not have uncovered such facts earlier and that the failure to discover such facts was attributable to some affirmative fraudulent act or acts perpetrated by the defendants. *Krehl v. Baskin-Robbins Ice Cream Co.*, 78 F.R.D. 108 C.D. Cal. 1978); *Chmielski v. City Products Corp., supra; Chevalier v. Baird Savings Ass'n.*, 72 F.R.D. 140 (E.D. Pa. 1976); *but see Minnesota v. United States Steel Corp., supra.* Second, it seems that liability on the claim of price discrimination requires individualized proof of the existence of competi-

tion between each disfavored customer and one or more favored customers. *See Shaw v. Mobil Oil Corp., supra.* Such individualized proof would predominate over the common questions of law and fact and would make class action treatment particularly inappropriate. *See, e.g., Boro Hall v. Metropolitan Tobacco Co., supra; Kelly v. General Motors Corp.*, 425 F. Supp. 13 (E.D. Pa. 1976). Third, it seems that damages will require proof of the amount of each individual claim. *See, e.g., Newberry v. Washington Post Co., supra; Windham v. American Brands, Inc., supra.*

In sum, the court is convinced that common questions do not predominate. The nature of the class is so all-inclusive that there are few common questions which relate to all members of the class. The claims asserted are so all-encompassing that some claims necessarily raise more individual than common questions.

Superiority

The second requirement that must be satisfied before an action may be permitted to proceed under Rule 23(b) (3) is that the court find that class action treatment is superior to other methods for the fair and efficient adjudication of the controversy. This requirement requires the court to determine whether or not the objectives of the class action procedure will be achieved in the particular case.

Typically, class action treatment is superior to other methods of adjudication if the number of persons interest in the outcome of the litigation is large and separate actions would impair judicial economy. 7A C. Wright & A. Miller, *Federal Practice & Procedure* § 1779 (1972). However, if each member of the class will be required to come

into court to establish his damages, there is little, if any, conservation of judicial resources.

Hoyt and Exteriors suggest that bifurcating the trial of the action would minimize the problems inherent in the need for individualized proof of damages. However, it is clear that there is no clear dividing line between the issues of liability and damages. *Windham v. American Brands, Inc.*, 565 F.2d 59 (4th Cir. 1977). It is also clear that the conduct of thousands of trials on the amount of damages would not serve to conserve judicial time and energy to any significant extent.

Therefore, the court concludes that the interest of the members of the proposed class in controlling the conduct of any action outweighs the minimal savings in judicial effort which would be effectuated by certification of the proposed class.

Conclusion

The court is convinced that it would be inappropriate to certify the class as proposed by Hoyt and Exteriors.

Order

Upon the foregoing,

IT IS ORDERED That the motion of the plaintiffs Hoyt Construction Company, Inc., and Minnesota Exteriors, Inc., for certification of this action as a class action and of themselves as representatives of a class of plaintiffs be and hereby is denied.

Dated: August 24, 1978.

/s/ Donald D. Alsop
United States District Judge

Appendix B

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United States District Court
District of Minnesota
Fourth Division

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Hoyt Construction Company, Inc.; Minnesota Exteriors, Inc.; on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

Alside, Inc.; Alcan Aluminum Corporation; Aluminum Company of America. Bethlehem Steel Corporation; Kaiser Aluminum and Chemical Corporation; Kaiser Aluminum and Chemical Sales, Inc.; Mastic Corporation; Reynolds Metals Co.; Revere Copper & Brass, Inc.; United States Steel Corporation,

Defendants.

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Memorandum Order

January 21, 1980

On August 24, 1978, this court entered its order denying the motion of the plaintiffs Hoyt Construction Company, Inc. (Hoyt) and Minnesota Exteriors, Inc. (Exteriors) for certification of this action as a class action and of themselves as representatives of a class of plaintiffs consisting of:

> "All persons, firms, corporations or other entities in the United States (except defendants and their wholly-owned business entities) who purchased direct-

ly from one or more of the defendants exterior metal siding and related building products and accessories at any time after June 3, 1971, or aluminum coil therefor or therein at any time after November 9, 1971."

Thereafter, plaintiffs filed a motion to "ALTER/ AMEND THE ORDER OF 8/24/78 PER FRCP 59 (e) AND 60 (b) OR RENEWED CLASS ACTION MOTION PER RULE 23." This latter motion sought an order of the court certifying a class in this action described as follows:

Residential Applicator Class

All business entities in the United States (except the defendants and their wholly-owned business entities) who purchased directly from one or more of the defendants after June 4, 1971, aluminum siding and related building products for application by them to residences.

It is perhaps noteworthy, if only to highlight the vicissitude of the problem, to indicate that the most recent is the plaintiffs' fifth offering of a class definition.

This court's order of August 24, 1978 sets forth in some detail those requirements of Rule 23 which, in the court's judgment, were not met under the showing made in support of the creation of a class as first described above.

In brief summary, the court's order of August 24, 1978 found the class action requirements lacking in a variety of areas, including the following:

Typicality

1. The court found differences between the legal and factual positions of Hoyt and Exteriors and the positions of the other members of the proposed class, particularly as regards the role of Hoyt and Exteriors as dealer applicators of residential aluminum siding in the Minneapolis/St. Paul area as compared to manufacturers or homeowners.

2. Some entities whom it would appear may have acted as co-conspirators would in fact be members of the class as proposed.

3. Under the then state of the law, the defendants may have had available a "consumer" defense to the claims of some class members, but not against others. *See Reiter v. Sonotone Corp.*, 579 F.2d 1077 (8th Cir. 1978), *rev'd*, 99 S. Ct. 2326 (1979).

Adequacy

1. In some respects the interests of Hoyt and Exteriors did not extend as far as the interests of some members of the proposed class, at least as regards aluminum coil.

2. The interests of Hoyt and Exteriors were not co-extensive with those of all members of the proposed class as regards the interests of siding manufacturers.

3. The interests of Hoyt and Exteriors were not co-extensive with those of all members of the proposed class as regards end users of the product.

4. Hoyt and Exteriors had only limited involvement in the agricultural and commercial siding markets.

5. The interests of Hoyt and Exteriors were inherently antagonistic to the interests of certain siding manufacturers

whom the plaintiffs sought to have included in the class and were likewise antagonistic to end-users.

6. The interests of Hoyt and Exteriors were antagonistic to the interests of any wholesaler or applicator who may have been a victim of price discrimination.

Predominance

The court was of the view that the inclusions of persons and entities at various levels in the chain of distribution created a variety of individual questions and issues, and there were few common questions which related to all members of the class.

Superiority

Citing *Windham v. American Brands, Inc.*, 565 F.2d 59 (4th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978), the court concluded that class action treatment was not superior to other methods for the fair and efficient adjudication of the controversy.

A comparison of the class definition rejected by this court's order of August 24, 1978 and the class definition proposed by the motion now pending, when read against the backdrop of the court's rationale, make it obvious that the plaintiffs have sought to so modify the class definition as to meet the objections the court found inherent in the class as originally proposed.

The difficulty the court has with this effort on behalf of the plaintiffs is that it is sought without any semblance of additional affidavits, evidence, or further proof with reference to the most recent class proposal. It is almost as if the plaintiffs are deserving of the establishment of a class and their designation as the class representatives, and the

burden then shifts to the defendants to rebut what the plaintiffs treat as a virtual presumption of class entitlement. Superimposed upon this technical difficulty, is the dispute between the parties over the wisdom, significance, or effect of *Windham v. American Brands, Inc., supra.*

The most recent class definition sought does quite obviously overcome many of the objections that this court found to the creation of the class which was denied by the order of August 24, 1978. The difficulty comes in that without a meaningful presentation or dialogue as to the total impact of the class most recently defined and now sought, the court is ill equipped to judge the total impact of the creation of such class or its fulfillment of the requirements of Rule 23. Accordingly, the plaintiffs' most recent motion will be denied.

Whether the court's conclusion results from an "inexperienced" court's response to what plaintiffs characterize as defendants' "In Terrorem Tactics" or instead from the failure of plaintiffs' counsel to fulfill their responsibilities by clearly establishing the prerequisites of Rule 23 is of no real import. What is of significance is the possibility that there may yet exist a group of individual claimants deserving of an impartial adjudication of a justiciable controversy in a fashion that does comport with Rule 23.

Upon the foregoing,

IT IS ORDERED That the plaintiffs' motion for an order certifying the following described class and designating the plaintiffs the class representatives thereof be and the same hereby is in all things denied:

> All persons, firms, corporations or other entitles in the United States (except defendants and their

wholly-owned business entities) who purchased directly from one or more of the defendants exterior metal siding and related building products and accessories at any time after June 3, 1971, or aluminum coil therefor or therein at any time after November 9, 1971.

DATED: January 21, 1980

/s/ Donald D. Alsop
United States District Judge

# Appendix C

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United States District Court
District of Minnesota
Fourth Division

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Hoyt Construction Company, Inc.; Minnesota Exteriors, Inc.; on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

Alside, Inc.; Alcan Aluminum Corporation; Aluminum Company of America; Bethlehem Steel Corporation; Kaiser Aluminum and Chemical Corporation; Kaiser Aluminum and Chemical Sales, Inc.; Mastic Corporation; Reynolds Metals Co.; Revere Copper & Brass, Inc.; United States Steel Corporation,

Defendants.

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C-2

Order

4-75-Civ. 257

On January 31, 1980, counsel for plaintiffs filed in this court a motion designated in its title as follows:

> PLAINTIFFS' NOTICE OF MOTION AND MOTION TO ALTER/AMEND OR RELIEF FROM THE ORDER OF 1/21/80 PER FRCP 59 (e) and 60 (b) OR RENEWED CLASS ACTION MOTION PER RULE 23 OR IN THE *ALTERNATIVE*, CERTIFICATION FOR APPEAL UNDER 28 U.S. CODE SECTION 1292 (b)

In the body of the motion, the plaintiffs request that the court "set and notify counsel of briefing and oral presentation dates" to be concerned with the order of this court dated January 21, 1980. The motion appears to seek amendment of the court's order of January 21, 1980 for "mistake, misconception, unfairness and a possible minor change in the class description to comport more with the feeling expressed by the court in said order; and any other matter deemed appropriate by the court."

Upon all files, records and proceedings herein,

IT IS ORDERED That the motion of the plaintiffs as described above be and the same hereby is in all things denied.

DATED: February 8, 1980.

/s/ Donald D. Alsop
United States District Judge

## Appendix D

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United States District Court
District of Minnesota
Fourth Division

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Hoyt Construction Company, Inc.; Minnesota Exteriors, Inc.; on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

Alside, Inc.; Alcan Aluminum Corporation; Aluminum Company of America; Bethlehem Steel Corporation; Kaiser Aluminum and Chemical Corporation; Kaiser Aluminum and Chemical Sales, Inc.; Mastic Corporation; Reynolds Metals Co.; Revere Copper & Brass, Inc.; United States Steel Corporation,

Defendants.

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D-2

Errata

4-75-Civ. 257

On January 21, 1980, the court issued a Memorandum Order denying the most recent motion of the plaintiffs to alter/amend the order of 8/24/78 per FRCP 59 (e) and 60 (b) or renewed class action motion per Rule 23. In denying this motion for class certification, the court made a technical error in describing the class sought to be certified. The last paragraph of the Order on page 5, which describes the class sought to be certified, is hereby amended to read as follows:

Residential Applicator Class

> All business entities in the United States (except the defendants and their wholly owned business entities) who purchased directly from one or more of the defendants after June 4, 1971, aluminum siding and related building products for application by them to residences.

DATED: February 8, 1980.

/s/ Donald D. Alsop
United States District Judge

## Appendix E

Docket No. 454

Before The Judicial Panel On Multidistrict Litigation

In Re Exterior Siding And Aluminum Coil Antitrust Litigation

Transfer Order

This litigation consists of three actions pending in three districts—one action each in the Northern District of California, the Northern District of Illinois and the District of Minnesota. Presently before the Panel is a motion, as amended, by nine corporations that are defendants in all three actions to centralize, pursuant to 28 U.S.C. §1407, the actions in this litigation in the District of Minnesota for coordinated or consolidated pretrial proceedings. Plaintiffs in the California action have cross-moved to centralize the actions in the Northern District of California or, alternatively, the Northern District of Illinois. Plaintiffs in the Minnesota action have joined in the cross-motion. Plaintiff in the Illinois action also favors centralization and supports selection of the Northern District of Illinois or, in the alternative, the Northern District of California as the transferee forum. No responding party has opposed centralization.

On the basis of the papers filed and the hearing held, the Panel finds that the three actions involve common questions of fact and that centralization of the actions under 28 U.S.C. §1407 in the District of Minnesota will best serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation. All three actions allege a nationwide antitrust conspiracy

among defendants, extending from the use of production capacity for aluminum coil to the production, distribution and sale of exterior siding and related building products and accessories. Overlapping class certifications have also been sought in all three actions. Centralization under Section 1407 is thus necessary in order to eliminate duplicative discovery, prevent inconsistent pretrial rulings, and conserve the resources of the parties, their counsel and the judiciary.

Although no forum could be described as the nexus of this litigation, on balance we are persuaded that the District of Minnesota is the appropriate transferee forum because the action there is most advanced. The Minnesota action has been pending in that district for over five years. Rulings have been made on amendments to the complaint, discovery issues, a noncommunication order, class certification motions and other matters. In contrast, the Illinois and California actions have been pending for a little more than four months.

IT IS THEREFORE ORDERED that, pursuant to 28 U.S.C. §1407, the actions listed on the attached Schedule A and pending in districts other than the District of Minnesota be, and the same hereby are, transferred to the District of Minnesota and, with the consent of that court, assigned to the Honorable Charles R. Weiner, sitting by designation pursuant to 28 U.S.C. §292 (d), for coordinated or consolidated pretrial proceedings with the action already pending in that district listed on Schedule A.

For The Panel:
/s/ Andrew A. Caffrey
Chairman

Schedule A

*MDL-454—In re Exterior Siding and Aluminum Coil Antitrust Litigation*

*District of Minnesota*

*Hoyt Construction Co., Inc., et al. v. Alside, Inc., et al.*, C.A. No. 4-75-257

*Northern District of California*

*Western Builders, Inc., et al. v. Alside, Inc., et al.*, C.A. No. C80-4400-MHP

*Northern District of Illinois*

*Midwest Builders and Materials, Inc. v. Alside, Inc., et al.*, C.A. No. 80C6804

Appendix F

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United States District Court
District of Minnesota
Fourth Division

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In Re Exterior Siding And Aluminum Coil Antitrust Litigation

MDL 454

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Memorandum Opinion And Order
4-75 Civ. 257

August 3, 1981

Weiner, J.

Hoyt Construction Company, Inc., Western Builders, Inc., and Midwest Builders and Materials, Inc. each filed a separate action against the ten named defendants. In each action, the plaintiff alleged that the defendants violated 15 U.S.C. §§1, 2, the Sherman Antitrust Act, by engaging in a continuing conspiracy to restrain interstate commerce by specifically eliminating competition, and fixing and stabilizing prices at an artifically high level. Thereafter, the actions were consolidated into the present multidistrict litigation. Presently before this court is the motion of the plaintiffs for class action determination naming the present plaintiffs as the class representatives. For the following reasons, the motion is granted.

I.

In order to certify a case as a class action, the parties seeking certification bear the burden of proving that Rule

23 (a), and at least one of the conditions of Rule 23 (b) have been satisfied. *Tunstall et al v. Court of Common Pleas of Delaware County et al*, No. 75-3103 slip op. (E.D. Pa. July 6, 1981) at 12; *Bleznak v. C.G.S. Scientific Corp.*, 61 F.R.D. 493 (E.D. Pa. 1973). In determining whether to certify a case as a class action, the court has broad discretionary power requiring the exercise of individual judgment. *Philadelphia Electric Co. v. Anaconda American Brass Co.*, 43 F.R.D. 452, 458 (E.D. Pa. 1968).

Plaintiffs seek class certification under Rule 23 (a) and 23 (b) (3) of the Federal Rules of Civil Procedure. Rule 23 provides in pertinent part:

> "(a) *Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if
>
> (1) the class is so numerous that joinder of all members is impracticable,
>
> (2) there are questions of law or fact common to the class,
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and
>
> (4) the representative parties will fairly and adequately protect the interests of the class.
>
> (b) *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition
>
> * * *
>
> (3) the court finds that the questions of law or fact common to the members of the class

predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

II.

Rule 23 (a) (1) requires that joinder of all members of the prospective class be impracticable. There is no need to specify the exact number and identity of every possible class member because to do so would frustrate the purposes of class action suits. *In Re Sugar Industry Antitrust Litigation*, 73 F.R.D. 322 (E.D. Pa. 1976). Previously this district has held that the requirements of Rule 23 (a) (1) have been satisfied by a class numbering 20,000. *Philadelphia Electric Co., supra*. While the size of the class will not, in itself, determine whether joinder is impractical, in the case *sub judice*, plaintiffs assert that the class represented is comprised of approximately 82,000 direct customers of the defendants, well above the size necessary to make joinder impractical.

Another factor in determining whether joinder is impractical is the geographic distribution of the class members. *In Re Sugar Antitrust Litigation*, 1977-1 Trade Cases ¶61, 373 (N.D. Cal. 1976) at p. 71, 327. In the case *sub judice*, while plaintiffs do not assert that the class members are dispersed throughout the country, defendants are large multinational corporations, doing business in all parts of this country. Moreover, the stipulated plaintiffs are located in different parts of the country. We can thus conclude that the 82,000 direct customers which comprise the class are located in various areas of the country.

In sum, the plaintiffs have satisfied the burden imposed by Rule 23 (a) (1).

Rule 23 (a) (2) requires that there be questions of law or fact which are common to all members of the class.

Present in the case *sub judice*, are issues which deal with the existence of an alleged conspiracy to fix, maintain, and stabilize the prices of aluminum siding and related products at a level higher than would have existed, absent the conspiracy. Although we will not at this time determine the merits of the plaintiffs' allegations, in order to prove the existence of these issues, plaintiffs must provide the court with more than mere allegations. *Philadelphia Electric Co., supra*, at 458. Plaintiffs have submitted to this court the affidavit of Richard Hoyt, an acknowledged expert in the field of antitrust practices. Mr. Hoyt's affidavit states that plaintiffs' allegations are correct. (*See*, p. 28, 29 of affidavit). By no means does this dispose of the substantive issues. The facts in the Hoyt affidavit are considered correct, merely for the purposes of this motion.

This court has no difficulty in concluding that questions of law or fact do exist which are common to all members of the class. Thus, the plaintiffs have met the burdens of Rule 23 (a) (2).

Rule 23 (a) (3) requires that the claims or defenses of the representative parties be typical of the claims or defenses of the class itself. All members of the class and the class representatives are direct purchasers of aluminum siding and related products from the defendants. Moreover, they all sell these products to and install them for the consumer public. The claims of the representatives here are based upon the alleged purchase of the siding and related products at artificially inflated prices. As Judge Cahn

said in *In Re Sugar Industry Antitrust Litigation*, 73 F.R.D. 322, 326 (E.D. Pa. 1976):

> Each class representative challenges defendants' alleged unlawful anti-competitive activities and furthermore seeks monetary recovery for artificially inflated prices . . . paid by all other similarly situated purchasers. For these reasons, the named defendants . . . have claims . . . that are typical of those possible class members' charges.

Plaintiffs have satisfied the burdens imposed upon them by Rule 23 (a) (3).

Rule 23 (a) (4) requires that "[the] representative parties will fairly and adequately protect the interest of the class." Adequacy of representation has been held to encompass the consideration of two factors: "(a) the . . . attorney must be qualified, experienced, and generally able to conduct the proposed litigation, and (b) the [named representatives] must not have interests antagonistic to those of the class." *Wetzel v. Liberty Mutual Insurance Co.*, 508 F.2d 239, 247 (3d Cir. 1975), *cert. denied*, 421 U.S. 1011 (1975); *Tunstall et al v. Court of Common Pleas of Delaware County*, No. 75-3103 slip op. (E.D. PA. July 6, 1981) at 17. This court does not take issue with the representative counsel's ability to litigate the present matter.

Plaintiffs argue that since all of the claims are based upon identical legal theories, there are no antagonistic or conflicting interests between the named plaintiffs and the class to be represented. However, "in a case where the class members are in competition among themselves, the courts have denied class action where the representative

class member has interests potentially antagonistic to the class." *Boro Hall v. Metropolitan Tobacco Co., Inc.*, 74 F.R.D. 142, 144 (E.D. N.Y. 1977); *William Goldman Theatres, Inc. v. Paramount Film Distributing Corp.*, 49 F.R.D. 35, 40-41 (E.D. Pa. 1969). In the case *sub judice*, the representative plaintiffs and the class members are all persons engaged in the business of selling to and installing aluminum siding for the consumer public. Thus, they are all competitors. However, at least at this stage of the case, all the members of the class have a common interest in a favorable verdict on the issues presented for adjudication. Furthermore, potential problems that may appear later in the litigation, do not justify a denial of certification at this time.

Plaintiffs have met the requirements imposed by Rule 23 (a) (4), and thus have satisfied all the burdens of Rule 2 3(a).

III

Finally, since it has been established that the proposed class satisfies the requirements of Rule 23 (a), we now turn our attention to plaintiffs' contention that the class satisfies the burdens of Rule 23 (b) (3). Rule 23 (b) (3) states that (1) the questions of law or fact common to be members of the class must predominate over any questions affecting only individual class members, and (2) the class action method is superior to any other available methods for adjudication of the controversy.

As to the first requirement of the rule, this court has consistently held that the central issue of whether or not a conspiracy existed at all predominates over any individual damage claims in this type of litigation. *In Re Sugar Antitrust Litigation*, 73 F.R.D. 322, 346 (E.D. Pa. 1976);

*City of Philadelphia v. American Oil Company*, 53 F.R.D. 45, 67 (D.N.J. 1971). In the case *sub judice*, all of plaintiffs' claims are based upon the common issue of an alleged conspiracy. Thus, plaintiffs have satisfied the first requirement of Rule 23 (b) (3).

As to the second requirement of the rule that the class action mode is the most superior method of adjudicating the present claims, plaintiffs demonstrate to this court the requisite superiority. In assessing the superiority of the class action method, we look to the difficulties in management of the litigation. The factors to be considered are the size of the class, coupled with the ability to identify and notify the class members. In the case *sub judice*, while the class is extremely large, estimated by the plaintiffs themselves at 82,000, most of the members are easily identifiable from the defendants' own customer lists. Moreover, the consolidation of this litigation as a class action will facilitate the adjudication of the matter.

In sum, we hold that plaintiffs have satisfied the burdens imposed by Rule 23 (b) (3).

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Appendix G

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In The United States District Court
For The District Of Minnesota

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MDL NO. 454

In Re Exterior Siding And Aluminum Coil Litigation

No. 4-75 Civ. 257

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Hoyt Construction Company, Inc., Minnesota Exteriors, Inc., Et Al

vs.

Alside, Inc., et al.

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No. 4-81 Civ. 255

Western Builders, Inc. and Lagar Construction Company

vs.

Alside, Inc., et al.

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No. 4-81 Civ. 268

Midwest Builders & Materials, Inc.

vs.

Alside, Inc., et al.

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Memorandum Opinion And Order

January 5, 1982

Weiner, J.

On June 4, 1975, Hoyt Construction Company and Minnesota Exteriors, Inc. filed the first of these class actions in the District of Minnesota against ten defendants, alleging violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2, in connection with the production, sale and distribution of aluminum ingot, aluminum coil used in fabricating aluminum siding and related products. Similar suits were filed in the United States District Court for the Northern District of California by Western Builders, Inc. and Lagar Construction Company on December 9, 1980. Midwest Builders & Materials, Inc. filed suit in the Northern District of Illinois—Eastern Division on December 23, 1980.

Each plaintiff alleged that the defendants violated the Sherman Antitrust Act by engaging in a continuing conspiracy to restrain interstate commerce by specifically eliminating competition, and fixing and stabilizing prices at an artifically high level. By order dated April 8, 1981, the Judicial Panel for Multidistrict Litigation consolidated and transferred to this court, for pre-trial proceedings, the separate actions of Hoyt Construction Company, Inc., Western Builders, Inc. and Midwest Builders & Materials, Inc. against the ten defendants pursuant to §1407 of the Multidistrict Litigation Act (the Act) 28 U.S.C. §1407.

This court, in its Memorandum Opinion and Order dated August 3, 1981, granted the plaintiffs' motion for class action determination designating the present plaintiffs as the class representatives. Prior to consolidation and transfer

to this court, Judge Alsop of the United States District Court for the District of Minnesota had denied class action certification on three separate occasions in *Hoyt v. Alside*, Civil No. 4-75257.

The defendants have filed a joint motion to vacate this court's Order of August 3, 1981 granting plaintiffs' motion for class determination or, in the alternative, to certify the question for interlocutory appeal pursuant to 28 U.S.C. §1292 (b).

The defendants' objections to the certification of the class fall into two broad categories:

1. This court's alleged failure to accord substantial weight to the pre-consolidation decision of Judge Alsop of the District of Minnesota denying certification of the class, which they assert should have weighed heavily in this courts' determination, and

2. The plaintiffs' alleged failure to meet the threshhold requirements of class certification under F.R. Civ. P. 23 (a) and 23 (b) (3).

After careful review and reconsideration of the written submissions and oral argument of the plaintiffs and the defendants, we deny the defendants' motion to vacate, and we reaffirm our decision to certify the class consisting of direct purchasers of aluminum siding and related building products and accessories or the coil from which these products are made. We also deny defendants' motion for certification of an interlocutory appeal.

By its nature, complex multidistrict litigation presents the potential for conflicting and duplicative discovery and other pre-trial procedures. Avoiding conflicts and duplication in an effort to assure the "just and efficient" conduct

of such actions is the thrust of the Multidistrict Litigation Act, 28 U.S.C. §1407. *See*, 1968 U.S. Code Cong. and Admin. News, p. 1898. The transfer to a single jurisdiction, for pretrial proceedings, of numerous cases pending in various district courts, affords the opportunity for centralized, coordinated and consolidated management thereby avoiding the chaos of conflicting decisions and fostering economy and efficiency in judicial administration. The transfer provisions of §1407 (a) are entirely consistent with the goal of Fed. R. Civ. P. 23 in achieving economies of time, effort and expense and in promoting uniformity of decision as to persons similarly situated without sacrificing procedural fairness or bringing about other undesirable results.

The defendants have placed at issue the appropriate weight which this court, in reaching its *post*-consolidation certification decision as the transferee court, should have accorded the transferor court's three *pre*-consolidation class certification denials. They contend that Judge Alsop's three prior denials of class certification should carry substantial weight, and they accuse this court of failing to deal with those prior holdings in this case, and of overturning "a series of thoroughly considered rulings without justification" in the records. (Defendant's Brief - p. 15).

It is clear from the Act itself that class certification determinations are to be resolved by the transferee court free from the influence of any initial determinations of transferor courts. 3B Moore's Federal Practice ¶23.50. *See generally*, Post-Consolidation Impact, [1972] 3 Trade Reg. Rep. (CCH) 9202. *In Re Piper Aircraft*, 405 F. Supp. 1402 (Jud. Pan. Mult. Lit 1975); *In re Antibiotic Drugs*, 299 F.Supp. 1403 (Jud. Pan. Mult. Lit. 1969); *In*

*re Plumbing Fixtures*, 298 F.Supp. 484 (Jud. Pan. Mult. Lit. 1968). *Accord, In re the Upjohn Co. Antibiotic Cleocin Products*, 81 F.R.D. 482, 486 (E.D. Mich. 1979) (explaining that particularly with regard to pretrial proceedings and the conduct of discovery which are in the exclusive control of the transferee judge, multidistrict litigation is the *exception* to the general rule that one court may not disturb an order entered by another court). With specific reference to class action determinations made by a transferor court *prior* to transfer under §1407, the transferee court may resolve conflicting requests for class action determination, and review, modify, expand, revise or vacate any prior order as in its judicial discretion, is desirable or necessary in the interests of justice. *In re Plumbing Fixtures*, 298 F.Supp. at 489.

Under the Act then, this court is free to exercise those pretrial powers exercisable by the transferor court under the Federal Rules of Civil Procedure, and to make any pretrial order that court could have made in the absence of the transfer. *See generally*, Weigel, *The Judicial Panel on Multidistrict Litigation, Transferor Courts and Transferee Courts*, 78 F.R.D. 575, 576 (1978 (*citing, In re Antitrust Antibiotic Actions*, 333 F.Supp. 299, 303 (S.D.N.Y. 1971).

The decision to certify this matter for class action treatment was made within this court's broad discretion to render determinations regarding the maintainability of the action, definition of the class, limitation of its scope and conduct of the proceedings. *In re Cessna Distributorship*, 518 F.2d 213, 215 (8th Cir.), *cert. denied*, 423 U.S. 947 (1975). *Brown v. U.S.*, 508 F.2d 618, 627 (3d Cir. 1974), *cert. denied*, 422 U.S. 1043 (1975). That is not to say that

in the exercise of our broad discretion, the prior decisions of our learned colleague Judge Alsop were ignored; see page 9 attached, but it is to say that *this* court, upon thorough consideration of the briefs and oral arguments now before it, differed as to the result. The exercise of individual judgment is a fundamental part of the exercise of this court's discretionary powers, and in so doing we determined in our Memorandum Opinion and Order dated August 3, 1981 that the plaintiffs had met the threshhold requirements of F.R. Civ. P. 23 (a) and 23 (b) (3) and thereby granted their motion for class action certification. We have not been presented with any additional information which would cause us, upon reconsideration, to vacate that order and we therefore reaffirm it and deny the defendant's motion to vacate.

Defendants have requested, in the alternative, that we certify our class action certification determination for interlocutory appeal pursuant to 28 U.S.C. §1292 (b). The statute reads in pertinent part that:

> (b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.

In multidistrict litigation, appeals from the decision of the transferee court, are to be made in the circuit in which the transferee court sits. *Utah v. American Pipe and Construction Co.*, 316 F.Supp. 837, 839 (C.D. Calif. 1970)

(emphasizing that just as Congress intended coordinated rulings on pretrial proceedings in one district court, coordination of rulings on pretrial decisions at the appellate level will be achieved in one court of appeals.) Post-Consolidation Impact, Trade Reg. Rep., *supra*. Certification for interlocutory appeal rests entirely in the discretion of the district court judge. *Gardner v. Westinghouse Broadcasting Co.*, 559 F.2d 209, 212 (3d Cir. 1977); *Ratner v. Chemical Bank New York Trust Co.*, 309 F.Supp. 983 (S.D. N.Y. 1970). *See also*, 1958 U.S. Code Cong. & Admin. News, p. 5255, 5257 (predicating the ultimate success of proposed subsection (b) in relieving district court backlog on the wisdom of the judges who adminster it.) The Court of Appeals for the Third Circuit has stated explicitly that it does not follow a policy of accepting freely appeals from the grant of class action certification particularly because such action is grounded in the discretionary power of the district court. *Link v. Mercedes-Benz of North America, Inc.*, 550 F.2d 860 (3d Cir.), *cert. denied*, 431 U.S. 933 (1976). *Accord, Gardner, supra*, at 221. *Gardner* emphasizes that "class determination, whether affirmative or negative, lacks the immediate and drastic consequences which attend an injunction and which form the basis for excepting injunctive rulings from the final judgment rule" for the purpose of appellate review. *Gardner, supra*, at 213. But that does not preclude certification of an interlocutory appeal in the face of exceptional cases presenting special circumstances. *In re Cessna Distributorship, supra*, at 216. *Accord, Sullivan v. Pacific Indemnity Co.*, 566 F.2d 444 (3d Cir. 1977); *Link v. Mercedes-Benz, supra*.

Those special circumstances are enumerated in §1292 (b); in the conjunctive they are:

1. The presence of a controlling question of law.

2. as to which there is a substantial ground for a difference of opinion,

3. the immediate appeal from which may materially advance the ultimate termination of the litigation. 28 U.S.C. §1292 (b).

Plaintiffs contend that class certification is a question of fact, while the defendants contend it is a question of law. *See, Link v. Mercedes-Benz, supra,* (where the judges of the Third Circuit similarly reached differing characterizations.) However, we need not resolve that issue because assuming arguendo that class certification is a controlling question of law, this court has determined that the defendants have not met criteria 2 and 3 and on that basis alone, certification of an appeal would be inappropriate.

Defendants advance the argument that the differing conclusions reached by this court and Judge Alsop of the District of Minnesota demonstrate a substantial ground for a difference of opinion regarding the propriety of class certification. We reiterate that it was within the discretion of this court *alone,* as the transferee court, to grant certification, and we clearly enunciated our reasons for doing so in our opinion of August 3, 1981.

Although the Eighth Circuit has recognized the beneficial role which an interlocutory certification can play in serving the legitimate objectives of class action litigation when "it fairly appears that an immediate appeal may materially advance the ultimate termination of the litigation." *Sperry Rand Corp. v. Larson,* 554 F.2d 868, 871 n. 3 (8th Cir. 1977), such a situation is not presented in

the case *sub judice*. In light of the already protracted existence of this litigation, spanning the years 1975 through 1981, one can hardly imagine that an interlocutory appeal of class certification will promote the underlying policies of §1292, to avoid harm to the parties from an erroneous interlocutory order, and to avoid wasted trial time and litigation expense. To the contrary, this appeal, if permitted, would impede rather than advance the ultimate termination of the litigation, particularly in the absence of a substantial ground for a difference of opinion on a controlling issue of law.

Defendants have advanced no unique considerations for this court's evaluation which convince us that this case presents special circumstances bringing it outside the general rule and making certification for interlocutory appeal appropriate. Accordingly, the defendants' motion for certification of an interlocutory appeal pursuant to 28 U.S.C. §1292 (b) is denied.

Appendix H

United States Court of Appeals
For The Eighth Circuit

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No. 82-1105

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In Re: Exterior Siding and Aluminum Coil Antitrust Litigation (M.D.L. No. 454)

Alside, Inc.; Alcan Aluminum Corporation; Aluminum Company of America; Bethlehem Steel Corporation; Kaiser Aluminum and Chemical Corporation and Kaiser Aluminum and Sales, Inc.; Mastic Corporation; Reynolds Metals Company; Revere Copper & Brass, Inc.; and United States Steel Corporation

Petitioners.

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Petition for Writ of Mandamus

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Submitted: May 18, 1982
Filed: December 29, 1982

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Before ROSS, ARNOLD and JOHN R. GIBSON, Circuit Judges

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JOHN R .GIBSON, Circuit Judge

Petitioners, defendants in the action below, seek a writ

of mandamus, contending that the district court [1]improperly granted class certification to plaintiffs in this action.

Plaintiffs Hoyt Construction Company, Inc., and Minnesota Exteriors, Inc., originally filed an antitrust action against defendants Alside, Inc., *et al.*, in the District of Minnesota in 1975. Plaintiffs alleged numerous antitrust violations, including conspiracies to monopolize the exterior siding and aluminum coil business. Plaintiffs attempted to have a class certified consisting of all parties who had purchased aluminum coil or exterior metal siding and related building products and accessories directly from defendants since the early 1970s. District Judge Donald Alsop,[2] to whom the case was assigned, denied class certification on August 24, 1978, in a comprehensive order in which he concluded that plaintiffs had failed to meet the requirements of Rule 23 (a) and (b) (3), Fed. R. of Civ. P. Plaintiffs then attempted to have a more narrowly defined class certified, but Judge Alsop refused on two occasions to reconsider his prior denial of class certification.

Subsequently on December 9, 1980, plaintiffs Western Builders, Inc. and Lagar Construction Company filed an action similar to the *Hoyt* case in the Northern District of California, and on December 22, 1980, plaintiffs Midwest Builders and Materials, Inc., filed another similar action in the Northern District of Illinois.

Defendants then moved to have the three cases centralized by the Judicial Panel on Multidistrict Litigation, pursuant to 28 U.S.C. § 1407, and requested that the con-

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[1]The Honorable Charles R. Weiner, United States District Judge for the Eastern District of Pennsylvania, sitting by designation in the District of Minnesota.

[2]The Honorable Donald D. Alsop, United States District Judge for the District of Minnesota.

solidated action be assigned to the District of Minnesota for pretrial proceedings. Plaintiffs cross-moved for centralization of the actions, requesting that they be assigned either to the Northern District of California or to the Northern District of Illinois. The Multidistrict Litigation Panel found that the three actions involved common questions of fact, and that centralization in the District of Minnesota would best serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation. The Panel found that all three actions alleged similar antitrust violations and that overlapping class certifications had been sought in all three actions. The Panel assigned the California and Illinois actions to the District of Minnesota since the case there was the most advanced,[*] and designated Judge Charles R. Weiner, of the Eastern District of Pennsylvania, to sit by designation in the District of Minnesota "for coordinated or consolidated pretrial proceedings with the action already pending in that district."

After the actions were assigned to Judge Weiner, plaintiffs moved again for class certification. On August 3, 1981, Judge Weiner certified a class consisting of parties who had purchased aluminum coil or exterior aluminum siding and related building products and accessories directly from defendants since the early 1970's. Defendants subsequently

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[*]The Multidistrict Panel order stated:

> Although no forum could be described as the nexus of this litigation, on balance we are persuaded that the District of Minnesota is the appropriate transferee forum because the action there is most advanced. The Minnesota action has been pending in that district for over five years. Rulings have been made on amendments to the complaint,—discovery issues, a noncommunication order, class certification motions and other matters. In contrast, the Illinois and California actions have been pending for a little more than four months.

moved to vacate Judge Weiner's class certification order or, in the alternative, to have the question certified for interlocutory appeal pursuant to 28 U.S.C. § 1292 (b). Judge Weiner refused to decertify the class, and further refused to certify for interlocutory appeal. Defendants have now petitioned for a writ of mandamus ordering Judge Weiner to vacate his class certification order.

The only individual plaintiffs before Judge Alsop were Hoyt Construction and Minnesota Exteriors, both Minnesota corporations which installed aluminum siding in the residential market. Judge Alsop denied class certification in *Hoyt* because he found that Hoyt and Exteriors' claims were not typical of those of other members of the proposed class, which included groups as diverse as commercial and agricultural aluminum siding installers, aluminum siding manufacturers, and homeowners. Judge Alsop also found that plaintiffs Hoyt and Exteriors would not adequately represent the proposed class because their interests were not coextensive with the interests of the class, and because the interests of some class members were antagonistic to those of Hoyt and Exteriors. Judge Alsop also found that plaintiffs did not meet the requirements of Rule 23 (b) (3), concluding that common questions of law or fact did not predominate and that a class action was not a superior method of adjudicating the case since much of the evidence as to liability would relate to less than the entire proposed class and since some of the claims would require individualized proof as to liability, damages, or both.

The underlying facts did not change between the time Judge Alsop made his rulings in *Hoyt* and the time Judge Weiner certified a class in the consolidated cases. The California and Illinois plaintiffs made the same allegations as

the *Hoyt* plaintiffs and sought overlapping class certification. During argument it was conceded that plaintiffs were in contact with each other before the filing of the new cases. Judge Weiner did not base his decision on changed circumstances. Rather, he stated that he simply "differed as to result" with Judge Alsop and that he was exercising his discretion to certify a class based on the facts before him.

The requirements for issuance of a writ of mandamus impose a substantial burden on the party seeking the writ. In *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34, 66 L.Ed.2d 193, 196 (1980), the Supreme Court stated, "It is not disputed that the remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." The Court stated:

> [T]he writ of mandamus "has traditionally been used in the federal courts only 'to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.' " [quoting *Will v. United States*, 389 U.S. 90, 95, 19 L.Ed.2d 305, (1967).] Only exceptional circumstances, amounting to a judicial usurpation of power, will justify the invocation of this extraordinary remedy.

*Id.* at 35, 66 L.Ed.2d at 196

A writ of mandamus will issue when a district court's actions have "so exceeded its discretion as to be a usurpation of power." *Sperry Rand Corporation v. Larson*, 554 F.2d 868, 872 (8th Cir. 1977).

Although mandamus is an extraordinary remedy to be used only in very unusual circumstances, this court has

previously observed that it "remains available in those extraordinary instances when the district court, in granting the maintenance of a class action, has exceeded 'the sphere of its discretionary power.'" *In Re Cessna Aircraft Distributorship Antitrust Litigation,* 518 F.2d 213, 216 (8th Cir.), *cert. denied* 423 U.S. 947, 46 L.Ed.2d 282 (1975). We conclude that, in this instance, Judge Weiner has so exceeded his discretion.

The class action certification issue was before Judge Alsop three times, and he denied class certification on all three occasions. His original order denying class certification is well-reasoned and detailed. After his intial denial of class certification, plaintiffs in *Hoyt* attempted to narrow their class certification definition to eliminate some of the problems which had concerned Judge Alsop. Even after the narrowing of their definition, however, Judge Alsop still found, in a second detailed opinion, that class certification requirements had not been met. He also denied plaintiffs' subsequent motion to alter and amend his class certification denial. The class definition which plaintiffs put before Judge Weiner was essentially identical to the one they had presented to Judge Alsop the first time. Thus, it was actually broader and less well defined than the second class certification definition which Judge Aslop had rejected as inadequate.

Class certification decisions are by their nature conditional and are subject to change. *Id.* at 215; Rule 23 (c) (1), Fed. R. Civ. P. However, Rule 23 does not contemplate that a judge should overrule a previous class certification decision without a sound basis. The Advisory Committee Notes on subsection (c) (1) state, "A determination once made can be altered or amended before the de-

cision on the merits if, upon fuller development of the facts, the original determination appears unsound." This language contemplates that, although a Rule 23 ruling might be conditional, a judge will not alter a previous ruling unless a change in the facts of the case calls for it.

Judge Weiner did not make any new factual findings. It is true that Judge Alsop had before him only the *Hoyt* case, which included only two individual plaintiffs. By the time the case reached Judge Weiner, two additional complaints had been filed, but these were, as petitioners contend, virtual "carbon copies" of the *Hoyt* complaint, seeking overlapping class certifications. Judge Weiner based his ruling on what he perceived to be his power as a multidistrict transferee court. He stated, "It is clear from the [Multidistrict Litigation] Act itself that class certification determinations are to be resolved by the transferee court free from the influence of any initial determinations of transferor courts." January 5, 1982 Order of Judge Weiner at 5. He concluded that the orders of a court in the pre-consolidation stage of a case were entitled to little or no weight after the cases were consolidated and put before a transferee court.

The powers of a transferee court are wide-ranging. *See: Weigel, The Judicial Panel on Multidistrict Litigation, Transferor Courts and Transferee Courts,* 78 F.R.D. 575 (1978). We do not question the power of a transferee court to overturn the decisions of a transferor court under the proper circumstances. A transferee court must be free to alter conflicting orders of transferor courts in order to effectuate the purposes of 28 U.S.C. § 1407. The powers of a transferee court are not unlimited, however.

Although a judge may not be bound by the rulings of

his predecessor, he also is not free to ignore them. This is the doctrine of "the law of the case", which holds that a judge ordinarily should not overrule the decisions of a prior judge in the same case without good cause. *See, generally:* 1B *Moore's Federal Practice* ¶ 0.404. We have observed previously that the law of the case doctrine is a rule of practice rather than a command to courts. *Otten v. Stonewall Insurance Co.*, 538 F.2d 210, 212 (8th Cir. 1976). However, the doctrine " 'is something more than mere courtesy, which implies only deference to the opinion of others, since it has substantial value in securing uniformity of decision, and discouraging repeated litigation of the same question.' " *German v. Universal Oil Products Co.*, 77 F.2d 70, 73 (8th Cir. 1935) quoting from *Mast, Foos & Co. v. Stover Manufacturing Co.*, 177 U.S. 485, 44 L.Ed. 856 (1900).

District courts have imposed law of the case limitations on themselves in the class certification area, as in other areas. *See e.g.: Sley v. Jamaica Water and Utilities, Inc.*, 77 F.R.D. 391 (E.D. Pa. 1977) (district judge refused to decertify class certified by his predecessor in the absence of changed circumstances). This court has frequently invoked the law of the case doctrine in refusing to reconsider issues brought up on prior appeals of the same case. *See, e.g.: Otten, supra; Metzger v. Hossack*, 165 F.2d 1 (8th Cir. 1948).

Other circuits have recognized that a judge's failure to defer to the rulings of his predecessor in the same case can amount to an abuse of discretion serious enough to warrant the granting of mandamus. *See: Hayman Cash Register Co. v. Sarokin*, 669 F.2d 162 (3d Cir. 1982); *ACF Industries, Inc. v. Guinn*, 384 F.2d 15 (5th Cir.), *cert. denied* 390 U.S. 949, 19 L.Ed. 2d 1140 (1968).

A court's overruling of a motion by its predecessor does not constitute an abuse of discretion in all cases. In *Zenith Laboratories, Inc. v. Carter-Wallace, Inc.*, 530 F.2d 508 (3d Cir.) *cert. denied* 429 U.S. 828, 50 L.Ed.2d 91 (1976), the Third Circuit upheld a district court's decertification of a class certified by a predecessor. However, the court based its holding in large part on the important changes in circumstances which had occurred between the two rulings. It is this "changed circumstances" basis which has formed the rationale for allowing a district court to overrule its predecessor in most instances. *See e.g.: In Re: The Upjohn Company Antibiotic Cleocin Products Liability Litigation*, 664 F.2d 114 (6th Cir. 1981). In the *Upjohn* case, the Sixth Circuit upheld a multidistrict transferee court's power to vacate and modify protective orders entered by transferor courts, and concluded that the law of the case doctrine did not control. Even in an area as clearly within the transferee court's discretion as discovery, however, the court stated that "a transferee judge ought as a practical matter to accord considerable deference to the judgment of the transferor court." *Id.* at 120.

In this case the Multidistrict Litigation Panel contemplated that Judge Weiner would give consideration to Judge Alsop's prior orders. The Panel's primary reason for assigning the consolidated cases to the District of Minnesota rather than to the Districts of California or Illinois was the fact that the Minnesota case had progressed much further than the other two cases. The Panel's order observed that class certification motions had been filed in the other two cases, but that only the *Hoyt* class certification motion had been ruled. Although the panel did not direct Judge Weiner to defer to Judge Alsop's order regarding

class certification, the Panel clearly intended Judge Weiner to make use of the substantial amount of work that had already been done by Judge Alsop.

We have before us a situation in which the Multidistrict Panel determined that several cases should be centralized in Minnesota, where the action had been pending for five years and where rulings, including class certification rulings, had been made. The district court of Minnesota was determined to be the "appropriate transferee forum." When Judge Weiner was assigned to preside over further coordinated and consolidated pretrial proceedings, he sat by designation in the transferee court. Yet Judge Weiner in his order of January 5, 1982 placed strong emphasis on the responsibility of the transferee court to make class certification determinations "free from the influence of any initial determinations of transeror courts." While he professed that the prior decisions of Judge Alsop were not ignored, he concluded that "*this* court, upon thorough consideration of the briefs and oral arguments now before it, differed as to the result." (Emphasis in original.)

Judge Weiner's order seemingly overlooks the fact that both Judge Alsop and he were sitting as judges of the same court—the District of Minnesota. Judge Weiner made no finding of changed circumstances, but simply disagreed with his predecessor. The three orders of Judge Alsop had dealt with increasingly limited class definitions, but Judge Weiner's order broadened the scope almost to that of the original defintions rejected by Judge Alsop.

While Judge Weiner recognized the view of this court, as explained in *Sperry Rand Corp. v. Larson*, 554 F.2d at 871, n. 3, that interlocutory appeal certification can play a beneficial role when "it fairly appears that an im-

mediate appeal may materially advance the ultimate termination of the litigation," he declined to certify the cases for appeal pursuant to 28 U.S.C. § 1292 (b) for two reasons. First, he rejected the claim that there was substantial ground for difference of opinion because of Judge Alsop's ruling on class, because it was "within the discretion of this court *alone*, as transferee court," to grant certification. Further, he observed the differing policy of the Third Circuit with respect to such appeals and felt that the delay caused by the appeal would impede rather than advance the ultimate termination of the litigation.

We recognize the broad authority placed in the transferee court by section 1407, but we are here dealing with differing rulings of the same district court. The Advisory Committee notes on Rule 23, as well as the law of the case doctrine, both contemplate that rulings on class certification will not be overturned absent changed circumstances. Here we have a painstaking and detailed analysis of the class certification issues in the earlier determinations of Judge Alsop, which had been recognized by the Multidistrict Panel. To have the transferee court, though sitting with a different judge, make a differing ruling only because the second judge "differed as to the result," and considered the issue to be within his discretion *alone*, so exceeds the sphere of that court's discretionary power that it is a usurpation of power. Mandamus is the only possible and appropriate remedy, and this court has so applied the remedy in the past on class certification issues.

What we say does not limit the powers of a transferee court to modify or vacate the orders of the transferor court. We recognize that in multidistrict litigation a transferee court must have such broad discretionary powers.

Our holding is limited simply to the situation where a district court is made a transferee court, and in a later decision reverses its position simply because the second judge differs as to the result with the predecessor judge, and without a change of circumstances.

A writ of mandamus is issued ordering (1) that the orders of the district court certifying a class entered August 3, 1981 and January 5, 1982 shall be vacated, and (2) that the district court shall refrain from recertifying a class unless and until a showing has been made of changed law or facts sufficient to justify departure from previous decisions of the district court.

ARNOLD, Circuit Judge, dissenting.

In my view, the Court today opens too wide a hole in the final-judgment rule. I therefore respectfully dissent.

In *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), a unanimous Supreme Court held that orders denying class certification are not appealable as "final decisions" within the meaning of 28 U.S.C. §1291. In so holding, the Supreme Court reversed this Court, *Livesay v. Punta Gorda Isles, Inc.*, 550 F.2d 1106 (8th Cir. 1977), which had been among the courts of appeals holding that a plaintiff could appeal the denial of class certification if, as a practical matter, the failure to certify a class would be the "death knell" of his claim. The Court invoked many of the factors traditionally used to justify the final-judgment rule, by which Congress, ever since the Judiciary Act of 1789, has set its face against piecemeal appeals. The Court pointed out that orders passing on requests for class certification are "subject to revision in the District Court." 437 U.S. at 469. "Thus, a district court's order denying or granting

class status is inherently tentative." *Id.* at 469 n. 11. In addition, "an order denying class certification is subject to effective review after final judgment at the behest of the named plaintiff or intervening class members." *Id.* at 469.

The same considerations apply at least as strongly to orders, like that before us in this case, *granting* class certification. In fact, there seems never to have been any serious contention that orders granting certification could be appealed under §1291. As the Court noted in *Coopers & Lybrand*, "the Courts of Appeals have correctly concluded that orders granting class certification are interlocutory." *Id.* at 476. Here, as in the case of denial of certification, an appeal after final judgment can correct any errors of the district courts. Neither the petitioning defendants nor this Court seem to dispute this point. It is true that a considerable amount of hypothetically unjustified expense and trouble will have to be borne before the time comes to appeal, but that is true of many pre-judgment rulings claimed to be incorrect. Congress has decided that the costs of allowing immediate appellate review usually exceed the benefits. In 1958 an exception was made to the general rule, in the form of §1292 (b), allowing interlocutory appeals in some cases with the concurrence of both the trial and the appellate courts. Here, the District Court denied §1292 (b) certification.

All of this is by way of preamble, simply to show that there is a strong policy in the Federal system against pre-judgment appellate review. Whenever a petition for mandamus or other extraordinary relief is filed, we are in fact being asked to make an exception to that policy. We may not do so merely because we think immediate appellate intervention is necessary to avoid unfairness. When it

passed §1292 (b), "Congress rejected the notion that the courts of appeals should be free to entertain interlocutory appeals whenever, in their discretion, it appeared necessary to avoid unfairness in the particular case." *Coopers & Lybrand, supra,* 437 U.S. at 474 n.24. Congress considered and rejected the proposal that the courts of appeals alone, without a prior district-court certification, be allowed to entertain interlocutory appeals.

Mandamus is formally distinct, of course, technically an original rather than an appellate proceeding. But the Supreme Court, protective of the final-judgment rule, has long hedged mandamus about with various restrictive formulae. Most recently, in *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35 (1980) (per curiam), the Court repeated that "[o]nly exceptional circumstances, amounting to a judicial usurpation of power, will justify the invocation of this extraordinary remedy." The petitioner must show that he has no other adequate means to attain the relief he desires, and that his right to issuance of the writ is clear and indisputable. *Ibid.* The order complained of may be wrong; it may be infected with reversible error, so that a final judgment will have to be reversed on appeal; but more must be shown to justify pre-judgment intervention by a court of appeals. These considerations must have special force with respect to decisions, like class certification, which depend heavily on facts and one's view of what they mean—decisions commonly called "discretionary," not in the sense that a judge may decide them by whim, but in the sense that different judges, both weighing the same relevant factors, may reasonably come to different conclusions. That kind of decision may be reversed on post-final-judgment appeal only for an abuse of discretion.

Something more than that, therefore, must be shown to justify mandamus if the vital distinction between that extraordinary remedy and an appeal is to be preserved. This is why the Supreme Court has warned against the dangers of issuing the writ "upon a mere showing of abuse of discretion." *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 665 n.7 (1978) (plurality opinion).

The "something more" that must be shown has most often been described by the label "usurpation of power." Judicial action without jurisdiction of the person or subject-matter might qualify, but "usurpation of power" seems to include more than just want of jurisdiction properly so called[1] We expressed the test in the following language in our most recent case involving a petition for mandamus to review an order on class certification: "mandamus should not issue unless it is shown that the trial judge clearly acted beyond his power given any reasonable interpretation of Rule 23 (e)." *In re Alleghany Corp.*, 634 F.2d 1148, 1149 (8th Cir. 1980). Mandamus was denied, and one judge concurred even though he "believe[d] that a serious mistake ha[d] been made by the trial court" and that the trial judge "should have recused himself." *Id.* at 1151 (Ross, J., concurring) (footnote omitted). The mistake, though serious, was just no egregious enough to be a "usurpation of power."

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[1]A court, for example, in some sense acts without "power" whenever its decision is a clear violation of law, even though it may unquestionably have "jurisdiction" over the parties and subject-matter. In *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336 (1976), mandamus was granted to annul a district court's order remanding a removed case to a state court. There was no question of the court's jurisdiction to rule on the motion to remand, and 28 U.S.C. §1447(d) provides that remand orders shall not be reviewable by appeal or otherwise. Mandamus was nevertheless granted because the district court's reason for the remand—docket congestion—was not a ground for remand under 28 U.S.C. §1447(c).

I think the same result should be reached here. Perhaps Judge Alsop's opinions denying class certification are more persuasive than Judge Weiner's opinions granting it. Certainly I should not vote to reverse Judge Alsop's decision if this were a direct appeal from it. Perhaps Judge Weiner should have given more weight to Judge Alsop's previous decisions. But he did not ignore them altogether. He simply gave them less weight than a majority of this Court would have. If Judge Alsop, on motion for reconsideration, had reversed himself and decided to certify a class after all, because he had had more time to study the law, or for any other reason commending itself to his discretion, I doubt that anyone would seriously urge that a peremptory writ issue to command Judge Alsop to adhere to his previous conclusion. I do not mean that changing one's mind is in itself a good thing, or that it could not be reversible error, but only that it is not, at least in the context of class certification, a "usurpation of power."

The Court, though conceding that the doctrine of "law of the case" may not be an inflexible command, invokes the doctrine to support its reasoning. To this I reply: "the law of *what* case?" Judge Alsop's decision might indeed be the law of the case brought in Minnesota by Hoyt Construction Co. and Minnesota Exteriors, Inc., but how can it be the law of the cases later brought by Western Builders, Inc., and Lagar Construction Co. in California, by Midwest Builders & Materials, Inc., in Illinois, and by Riverside Builders, the last case having been filed while this petition was pending before us? None of these later-filing plaintiffs was before Judge Alsop; none of them had a chance to argue before him that a class should be certified; yet all seem to be concluded by his ruling.

Rule 23 (c) (1) provides in so many words that "[a]n order" determining whether a class should be certified "may be altered or amended before the decision on the merits." The Notes of the Advisory Committee on Rules comment as follows: "A determination once made can be altered or amended before the decision on the merits if, upon fuller development of the facts, the original determination appears unsound." The Court reads that comment to mean that "fuller development of the facts" is the *only* circumstance that can justify alteration or amendment of the order. The Rule itself does not say that, but even if the Rule is so limited, why are not the three later-filed cases, and their centralization for pre-trial proceedings by the Judicial Panel on Multidistrict Litigation, a sufficient change in circumstances to warrant a fresh look at class certification? A judge might well regard as more suitable for class treatment a situation in which four suits are pending in different parts of the country, than a case in which only one action, involving only one part of the country, has been brought. In his initial opinion denying class certification. Judge Alsop referred to the fact that the Minnesota plaintiffs, Hoyt and Exteriors, were "limited to . . . the Minneapolis/St. Paul area." *Hoyt Constr. Co. v. Alside, Inc.*, No. 4-75 Civ. 257, slip op. p. 9 (D. Minn. August 24, 1978). He also concluded "that the stake of Hoyt and Exteriors is insufficient to insure a vigorous prosecution of [the] claims" of the proposed class. *Id.* at 13. Surely the view that the filing of three new actions in far-away states by four new corporate plaintiffs justifies a new look at the class question, is not so unreasonable as to be a "usurpation of power." Cf. *Zenith Labs., Inc. v. Carter-Wallace, Inc.*, 530 F.2d 508, 512 (3d Cir.), *cert.*

*denied*, 429 U.S. 828 (1976) (class certified by one judge; decertified by another, who assumed control of case "by normal rotation"; amendment of complaint to add four new counts is one of the changes in circumstances correctly taken into account by the second judge).

Furthermore, the Judicial Panel on Multidistrict Litigation (of which, as it happens, Judge Weiner is a member) has ruled that a transferee judge may review and revise class-action orders of the transferor courts.

> In the case of class action determinations made by the transferor court prior to transfer, the provisions of Rule 23 apply permitting the transferee court to determine the class action questions and to review and revise any class action order as in its sound judicial discretion is desirable or necessary in the interests of justice.

*In re Plumbing Fixture Cases*, 298 F. Supp. 484, 496 (J.P.M.D.L. 1968) (6-1 decision). Compare *In re The Upjohn Co. Antibiotic Cleocin Prods. Liability Litigation*, 664 F.2d 114 (6th Cir. 1981), holding that a transferee court may amend or vacate discovery orders made by a transferor court, despite the fact that "there is something unseemly . . . in permitting one judge to overrule another in a matter in which each would seem to have stood on an equal footing." *Id.* at 117.

Perhaps it is this apparent unseemliness, more than any other factor, that leads the Court to the conclusion it reaches today. I agree that judges should not freely ignore the rulings of their predecessors in the same case. Possibly Judge Weiner should have given more consideration to Judge Alsop's rulings, which were well reasoned and care-

ful. I cannot conclude, however, that his failure to do so is the usurpation of power necessary to support the issuance of mandamus.

I respectfully dissent.

A true copy.

Attest:

Clerk, U. S. Court Of Appeals, Eighth Circuit.

# Appendix I

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United States Court Of Appeals
For The Eighth Circuit

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No. 82-1105

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In re Exterior Siding and Aluminum Coil Antitrust Litigation (M.D.L. No. 454)

Alside, Inc.; Alcan Aluminum Corporation; Aluminum Company of America; Bethlehem Steel Corporation; Kaiser Aluminum & Chemical Corporation; Kaiser Aluminum & Chemical Sales, Inc.. Mastic Corporation; Reynolds Metals Company; Revere Cooper & Brass, Inc.; and United States Steel Corporation,

Petitioners.

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On Petition for Writ of Mandamus to the United States District Court for the District of Minnesota.

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Submitted: March 14, 1983
Filed: March 28, 1983

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Before LAY, Chief Judge, HEANEY, BRIGHT, ROSS, McMILLIAN, ARNOLD, JOHN R. GIBSON, and FAGG, Circuit Judges, *en banc*.

Per Curiam.

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The Clerk is directed to file the Supplemental Appendix tendered by Petitioners.

The petition for writ of mandamus is denied by an equally divided Court.

HEANEY, Circuit Judge, with whom BRIGHT, ROSS, and JOHN R. GIBSON, Circuit Judges, join, dissenting.

We would grant the petition for mandamus. The transferee judge not only ignored the prior opinions of the transferor judge in certifying a class, but he certified a class infinitely broader than the one the plaintiffs had last requested be certified by the transferor judge. There is no record support for the broader class certified.

A true copy.

Attest:

Clerk, U.S. Court Of Appeals, Eighth Circuit.

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## Appendix J

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### PARENTS, SUBSIDIARIES (EXCEPT WHOLLY OWNED SUSIDIARIES), AND AFFILIATES OF PETITIONERS

#### ALCAN ALUMIUM CORPORATION

Rusco Window Company of Roanoke, Incorporated (Affiliate)
Alcan Aluminum Limited (Parent Company)

Alcan Aluminum Limited has more than 100 subsidiaries and affiliates in foreign countries. Alcan Aluminum Corporation will furnish the names of such companies to the Clerk should they become relevant or should the Court request them.

#### ALSIDE, INC.

United States Steel Corporation (Parent Company). United States Steel Corporation has signed a letter of intent to sell Alside, Inc., to William W. Winspear of Dallas, Texas.

#### ALUMINUM COMPANY OF AMERICA

Aguas Industriales "La Presa" A.C.
Alcoa Aluminio do Nordeste S.A.
Alcoa Aluminio S.A.
Alcoa Mineracao S.A.
ALCOA-NEC Communications Corp.
Alcoa Nederland B.V.
Alcoa of Australia Limited
Alcoa of Great Britain Limited
Aludrum B.V.
Alumar Administracao De Bens S.A. (Realumar)
Alumar Administracao Industrial S.A. (Alumar)
Alument B.V.

Aluminio, S.A. de C.V.
Aluwhite Electropaint Limited
Capsulas Metalicas, S.A.
Compagnie Des Bauxites De Guinee
Complejo Industrial Pedernales, S.A.
Dowell Australia Limited
Dowell Brett Pty. Limited
Drumalu B.V.
Empresa Imobiliaria Maranhense Ltda.
Fonderie Alcoa-MG S.A.
Halco (Mining) Inc.
Inmobiliaria Aluminio S.A. de C.V.
Intal B.V.
Lamitref Aluminum N.V.
Mineraria Silius S.p.A.
Moralco Limited
Mosal Aluminum, Elkem A/S & Co. (Partnership)
Shibazaki Seisakusho Limited
T.G.A. Pty. Limited
The Glass & Aluminum Suppliers Pty. Limited
Aco, Sociedad Anonima
  ACO Inversora, S.A.
    Inmobiliaria Centagro, C.A.
  Amuay Motors, C.A.
  Arrendamientos Aco, S.A.
    Aco Alquiler S.A.
    Inmobiliaria Centagro, C.A.
  Automotriz Vigia S.A.
  Hidromex Venezolana C.A.
  Lamax S.A.
  Motoriente Ciudad Bolivar C.A.
  Motoriente San Felix, S.A.
  Franquicias Unidas Occidente, S.A.
  Talleres Unidos, C.A. (TAUNICA)
Administradora Maracay C.A.
Amortiguadores, S.A.
Auto Caracas, Sociedad Anonima

Aco Alquiler S.A.
Aco Alquiler Occidente, S.A.
Aco Alquiler Oriente, S.A.
Flotillas Y Arrendamientos (Floarca) C.A.
Inmobiliaria Centagro, C.A.
Industrias Fairbanks Morse De Venezuela, S.A.
Inversora Covenal, C.A.
Inversiones Auven C.A.
Servimar S.A.
Inversora Veritas, S.A.
Inmobiliaria Araure (INMAR, S.A.)
Aco Alquiler, S.A.
Inmobiliaria Centagro, C.A.
Maquinarias Y Servicios Aco, S.A.
Maquinarias Y Servicios Aco, S.A.
Planta De Motores - PLAMOANCA C.A.
Talleres Unidos, C.A. (TAUNICA)
Forauto C.A.
Aco Alquiler S.A.
Flotillas y Arrendamientos (Floarca) C.A.
Inmobilia Centagro, C.A.
Grupo Covenal Mariara C.A.
Inversiones Almonital, C.A.
Administradora Almonital C.A.
Asmeca S.A.
Autoespuma C.A.
Espumacar S.A.
Fabrica Nacional De Forres Y Accesorios Para Carros C.A.
Enmar C.A.
Filtravedo S.A.
Procesos Galvanicos S.A. "PROGAL"
Sicam de Venezuela, S.A.
Administradora Almonital C.A.
Asmeca S.A.
Inversiones Auven C.A.

C.A. Venezolana de Produccion Renault
Constructora Venezolana de Vehiculos, C.A.
Metalmar C.A.
Funmar S.A.
Planta De Motores - PLAMOAN C.A.
Inversiones Metalurgicas C.A.
Amortiguadores, S.A.
La Casa Del Amortiguador S.A.
La Casa Del Amortiquador Barquisimeto S.A.
Sinterizados Del Caribe, C.A.
Trefilerias Mariara, C.A. - TREMARCA
Estampados Del Caribe C.A.
Tupla C.A.
Tupla C.A.
Inversiones Araco Compania Anonima
Inversiones Rialpe S.A.
Furukawa Aluminum Co., Ltd.
Atsugi Aluminum Kogyo Kabushiki Kaisha
Higashi Nippon Forging Co., Ltd.
Kohmi Metals Co., Ltd.
Nippon Foil Mfg. Co., Ltd.
Nippon Laminate Co., Ltd.
Nippon Laminate Co., Ltd.
Nippon Light Metal Mfg. Co., Ltd.
Nishi-Nippon Aluminum Co., Ltd.
Nissei Sangyo Co., Ltd.
Yamada Keikinzoku Co., Ltd.

KAISER ALUMINUM & CHEMICAL CORPORATION

DOMESTIC COMPANIES

Queensland Alumina Holdings N.V.
Queensland Alumina Limited
Queensland Alumina Finance N.V.
Second Queensland Alumina Security Corporation
Queensland Alumina Security Corporation
Hindalco
Minerals & Minerals Limited

Renusagar Power Company Limited
Alpart Farms (Jamaica) Ltd.
Alumina Partners of Jamaica
Jamaica Alumina Security Company, Ltd.
Oakland City Center Hotel Company, Inc.

FOREIGN COMPANIES

Aluminum Products Company Limited
Anglesey Aluminum Limited
Societe D'Etudes Des Bauxites Du Cameroun
Thai Metal Works Company, Ltd.
Volta Aluminum Company Limited
Hopewell International Company Limited
Gerro Kaiser Dosenwerk GmbH & Co. K.G. (Partnership)
Grundstucksverwaltungsgesellschaft Objekt Wallersheim MbH
Kaiser Aluminium Huttenwerk GmbH
Austria Dosen Gesellschaft MbH
Austria Dosen Gesellschaft MbH & Co. K.G. (Partnership)

REYNOLDS METALS COMPANY

ALPART FARMS (JAMAICA), LTD.
ALUMINA PARTNERS OF JAMAICA
ALUMINIO DEL CARONI, S.A.
ALUMINIO REYNOLDS, S.A.
ALUMINIO REYNOLDS, SANTO DOMINGO, S.A.
ALUMINIUM OXID STADE GESELLSCHAFT MIT BESCHRANKTER HAFTUNG
BENNETT MANOR ASSOCIATES
BURRSTONE ASSOCIATES
BUSHNELL PLAZA APARTMENTS
BUSHNELL PLAZA CONDOMINIUM ASSOCIATION, INC.
BUSHNELL PLAZA DEVELOPMENT CORPORATION
CATHEDRAL SQUARE ASSOCIATES

CATHEDRAL SQUARE ASSOCIATES II
CHACE INVESTORS JOINT VENTURE
CITY VENTURE CORPORATION
COMPANIA METALLURGICA COLOMBIANA, S.A. "COMECOL"
CROWN OAK ASSOCIATES OF PENFIELD
CURTIS APARTMENTS ASSOCIATES
CYPRESS COURTS ASSOCIATES, LTD.
EASTWICK JOINT VENTURE
EASTWICK JOINT VENTURE II
EASTWICK JOINT VENTURE III
EASTWICK JOINT VENTURE IV
EGYPTIAN ALUMINUM PRODUCTS COMPANY
ESKIMO EUROP, S.A.R.L.
ESKIMO PIE CORPORATION
ESKIMO PIE CORPORATION OF CANADA, LIMITED
EXPERT CANDY LTD.—LE BONBON EXPERT LTEE.
GAS NATURAL COLOMBIANO, S.A.
HAMBURGER ALUMINUM—
WERK GESELLSCHAFT MIT BESCHRANKTER HAFTUN
INDUSTRIA NAVARRA DEL ALUMINIO, S.A.
INDUSTRIAS LACTEAS DEL YOCOIMO, S.A.
INDUSTRIAS METAL—MECANICAS DEL QUINDIO S.A.
JAMAICA ALUMINA SECURITY COMPANY, LTD.
JAMAICA REYNOLDS BAUXITE PARTNERS
LOMER DEVELOPMENT CORPORATION
LYNX—CANADA EXPLORATIONS LIMITED
MADISON MANOR ASSOCIATES
MANICOUAGAN POWER COMPANY—LA COMPAGNIE HYDROELECTRIQUE MANICOUAGAN
MIDTOWN ASSOCIATES
MILL POND DEVELOPMENT CORPORATION
MILL POND TOWERS ASSOCIATES

MINAS DO DRAGAO LTDA.
MINERACAO RIO DO NORTE S.A.
MINERACAO SAO JORGE LTDA.
MINERADORA DE BAUXITA LTDA.
MINERAIS DE ALUMINIO LTD.
MITSUBISHI ARUMINIUMU KABUSHIKI KAISHA
MONTAJE DE PLANTAS MONTAPLAN, S.A.
THE NATIONAL HOUSING PARTNERSHIP
NEW EASTWICK CORPORATION
OCEANSIDE ESTATES ASSOCIATES, LTD.
OMNIA MINERIOS LTDA.
PHILLIPS—C.B.A. CONDUCTORS LIMITED
PRESIDENTIAL DEVELOPMENT CORPORATION
PRESIDENTIAL MANOR CORPORATION
PRESIDENTIAL PLAZA ASSOCIATES
PRESIDENTIAL PLAZA CORPORATION
PRESIDENTIAL PLAZA INVESTORS
PUERTO DE HIERRO, SOCIEDAD ANONIMA
R.I.A.—REYNOLDS ALUMINUM ITALIA S.P.A.
RAYBURN MANOR ASSOCIATES
RECICLAJES ENVALIC, C.A.
REGENCY JOINT VENTURE
REGENCY JOINT VENTURE II
REGENCY WEST ASSOCIATES
REYCAN RESEARCH LIMITED—SOCIETE DE RECHERCHES REYCAN LIMITEE
REYNOLDS ALUMINIO, SOCIEDAD ANONIMA DE CAPITAL VARIABLE
REYNOLDS ALUMINUM (THAILAND) COMPANY, LIMITED
REYNOLDS ALUMINUM COMPANY OF CANADA LTD.—SOCIETE D'ALUMINIUM REYNOLDS (CANADA) LIMITEE
THE REYNOLDS—GILBANE—WEYBOSSET JOINT VENTURE
REYNOLDS PHILIPINE CORPORATION
REYNOLDS REGENCY CORPORATION

REYWEST DEVELOPMENT CORPORATION
ROBERTSHAW CONTROLS COMPANY
S.L.I.M. CISTERNA S.P.A.
S.L.I.M.—SOCIETA LAVORAZIONI INDUSTRIALI METALLI S.P.A.
SUPERENVASES ENVALIC C.A.
TITUSVILLE MANOR ASSOCIATES
UMCO, S.A.
UNION INDUSTRIAL Y ASTILLEROS BARRANQUILLA "UNIAL" S.A.
VALESUL ALUMINIO S.A.
VOLTA ALUMINIUM COMPANY LIMITED
WESTEEL INTERNATIONAL LTD.
WEYBOSSET HILL DEVELOPMENT CORPORATION
WORSLEY ALUMINA PTY. LTD.
WORSLEY JOINT VENTURE

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

**No. 82-2134**

**In Re: Exterior Siding and Aluminum Coil Antitrust Litigation (MDL 454)**

**ALSIDE, INC., et al.,**

**Petitioners,**

**VS.**

**THE HONORABLE CHARLES R. WEINER, Judge, United States District Court, Sitting by Designation in the District of Minnesota,**

**Respondent.**

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## PARTIES INVOLVED

Although the Honorable Charles R. Weiner is designated as the respondent in the Petition for Writ of Certiorari, the real parties in interest, on whose behalf this brief in opposition is submitted, are the plaintiffs Hoyt Construction Company, Inc., Minnesota Exteriors, Inc., Western Builders, Inc., Lagar Construction Company, Midwest Builders & Materials, Inc., and Riverside Builders, Inc.

## TABLE OF CONTENTS

## APPENDIX INDEX

## TABLE OF AUTHORITIES

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

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**No. 82-2134**

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**In Re: Exterior Siding and Aluminum Coil Antitrust Litigation (MDL 454)**

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**Respondent.**

---

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Plaintiffs respectfully request this Court to deny the Petition for a Writ of Certiorari for the reasons set forth below.

## COUNTERSTATEMENT OF THE CASE

Petitioners are defendants in the multidistrict *Aluminum Siding Antitrust Litigation*, M.D.L. 454. By their Petition, they seek to overturn a decision of the Eighth Circuit sitting *en banc* refusing to issue a writ of mandamus to compel a transferee district court judge to vacate an order certifying a class.[1]

[1] For a chronology of events, see the Procedural History, Appendix A.

M.D.L. 454 consists of four price-fixing antitrust class actions filed by six named plaintiffs in the United States District Courts for the District of Minnesota, the Northern District of Illinois, and the Northern District of California.[2] Plaintiffs have alleged that, over a period of many years, the defendants monopolized and conspired to raise, fix, maintain or stabilize the price of aluminum siding and coil throughout the United States in violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2).

The first action was filed by plaintiffs Hoyt Construction Company, Inc. (Hoyt) and Minnesota Exteriors, Inc. (MEI) in 1975 in the District of Minnesota. The district court (Alsop, J.) denied plaintiffs' request for class certification, concluding that plaintiffs were limited to the Minneapolis/St. Paul area and that the interests of Hoyt and MEI were not sufficient to ensure vigorous prosecution of the claims. (Memorandum Opinions, August 24, 1978, January 21, 1980, and February 8, 1980, Petition, Appendices A-D).

In 1980, plaintiffs Western Builders, Inc. (Western) and Lagar Construction Company (Lagar) filed an action in the Northern District of California and plaintiff Midwest Builders and Materials, Inc. (Midwest) filed an action in the Northern District of Illinois. These cases were also filed as class actions against the defendants named by Hoyt and MEI.

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[2] *Hoyt Construction Company, Inc., et al.* v. *Alside, Inc.*, District of Minnesota, Fourth Division, Civil Action No. 4-75-257; *Western Builders, Inc., et al.* v. *Alside, Inc., et al.*, Northern District of California, Civil Action No. 80 C 4400; *Midwest Builders and Materials* v. *Alside, Inc., et al.*, Northern District of Illinois, Eastern Division, Civil Action No. 80 C 6804; *Riverside Builders, Inc.* v. *Alside, et al.*, Northern District of Illinois, Eastern Division, Civil Action No. 82 C 1027.

In January, 1981, defendants filed a motion before the Judicial Panel on Multidistrict Litigation to consolidate the pending cases pursuant to 28 U.S.C. § 1407.[3] This motion was filed prior to the filing of any motion for class certification by Western, Lagar or Midwest. The Panel found that the actions involved common questions of fact and transferred the *Western, Lagar* and *Midwest* cases to the District of Minnesota for consolidated or coordinated pretrial proceedings with the *Hoyt* and *MEI case*. The judge appointed to sit by designation, the Honorable Charles R. Weiner, had previously been appointed to sit as a district judge in the District of Minnesota (Appendix B).[4]

After transfer of the cases, all plaintiffs filed a joint motion for class certification with Judge Weiner. Judge Weiner ordered the parties to file supplemental briefs on the class certification issue by July 20, 1981. A pretrial conference with all parties represented was held prior to the due date for the briefs and none of the defendants requested an extension of time to file.

On July 20, 1981, plaintiffs timely filed their supplemental class brief, a revised affidavit of their economist, and exhibits (Appendix C). Defendants, however, did not file

[3] The Petition, at page 5, incorrectly states that "the parties" moved for multidistrict consolidation.

[4] Judge Weiner is experienced in class action matters and has both granted and denied class certification in the following published cases: *In re Exterior Siding and Aluminum Coil Antitrust Litigation*, 538 F.Supp. 45 (D.C. Minn. 1982) (granted); *In re Caesars Palace Securities Litigation*, 360 F.Supp. 366 (S.D.N.Y. 1973) (granted); *Swarb* v. *Lennox*, 314 F.Supp. 1091 (E.D.Pa. 1970) (granted); *District Council of the Port of Philadelphia* v. *Seatrain Lines, Inc.*, 377 F.Supp. 1278 (E.D. Pa. 1973) (denied); *Alexander* v. *Gino's, Inc.*, 21 Fair Empl. Prac. Cas. (BNA) 183 (E.D.Pa. 1979), *aff'd*, 621 F.2d 71 (3d Cir. 1980), *cert. denied*, 449 U.S. 953 (1980) (denied); *Hackett* v. *General Host Corp., et al.* 1972 Trade Cas. (CCH) ¶ 73,879 (E.D.Pa. 1970) (denied).

any brief, affidavit or exhibits. On August 3, 1981, Judge Weiner entered an order certifying the class.[5]

Plaintiffs' papers presented Judge Weiner with changed facts and law. For example, the filing of three new cases with four new corporate plaintiffs from various parts of the United States had resolved Judge Alsop's earlier concerns regarding the typicality and adequacy of the class representatives (8th Cir. Opinion of December 29, 1982, dissent of Arnold, J., Petition, Appendix, H-17). Moreover, the Panel, in consolidating the cases, had found that there were common issues of fact. Finally, subsequent to Judge Alsop's rulings, several significant national antitrust class action decisions were issued granting certification in circumstances similar to this case.[6]

After the entry of the order certifying the class, defendants filed a motion to vacate the class certification order or, alternatively, for certification pursuant to 28 U.S.C. § 1292 (b). While this motion was being briefed, defendants filed a petition for a writ of mandamus. After full briefing and oral argument, defendants' motion was denied by memorandum order of January 5, 1982. (Petition, Appendix G).

[5] Defendants complain that the class action order was entered without benefit of briefing by them (Petition, 4). This only occurred because defendants failed to file their papers when due.

[6] The new cases cited to Judge Weiner by plaintiffs included: *In Re Corrugated Container Antitrust Litigation*, 80 F.R.D. 244 (S.D. Tex. 1978); *In Re Fine Paper Antitrust Litigation*, 82 F.R.D. 143 (E.D. Pa. 1979); *In Re Glassine and Greaseproof Paper Antitrust Litigation*, 88 F.R.D. 302 (E.D. Pa. 1980); *Hedges Enterprises, Inc.* v. *Continental Group, Inc.*, 81 F.R.D. 461 (E.D. Pa. 1979); *Impervious Paint Industries* v. *Ashland Oil Inc.*, 1980-1 Trade Cas. (CCH) ¶ 63,138 (W.D. Ky. 1980); *In Re Cement and Concrete Antitrust Litigation*, 1979-1 Trade Cas. (CCH) ¶ 62,502 (D. Ariz. 1979).

In January, 1982, defendants filed a second petition for mandamus.[7] A panel of the Eighth Circuit granted the writ by a two-to-one decision. Judge Arnold dissented, and in a detailed opinion, stated that the majority, in granting mandamus, had opened "too wide a hole in the final-judgment rule", contrary to controlling precedents of this Court and earlier decisions of the Eighth Circuit. Judge Arnold also stated that the majority had misapplied the "law of the case" doctrine in that there never had been a class certification ruling in the three new consolidated cases. (Petition, Appendix, H-12 and H-16).

In January, 1983, plaintiffs filed their petition for a rehearing *en banc*. In February, 1983, the full court of appeals granted the petition, vacated the decision of the panel, and set the mandamus petition for rehearing. On March 28, 1983, after oral argument, the writ of mandamus was denied by an equally divided court. (Petition, Appendix I).

## REASONS FOR DENYING THE WRIT

The Petition does not meet the standards of Rule 17 of this Court. Defendants have failed to show that the Eighth Circuit's decision conflicts with the decisions of this Court or any court of appeals, that the Eighth Circuit departed from the normal course of judicial proceedings, or that the Petition raises an important question of federal law which this Court has not previously decided but should. Further, the Petition ignores the legislative and judicial policy against appellate review of non-final orders, which policy itself presents a controlling reason to deny the writ.

The Court of Appeals did nothing more than exercise its discretion not to issue a writ of mandamus to compel the

[7] The first petition was voluntarily dismissed by defendants after Judge Weiner set defendants' motion for argument. After the second petition was filed, the Panel also transferred *Riverside Builders, Inc.* v. *Alside, et al.*, Northern District of Illinois, Civil Action No. 82 C 1027 (Riverside), to the District of Minnesota.

district court to vacate a class certification order. Similarly, the district court did nothing more than exercise *its* discretion to certify a class on the basis of the record before it at the time of certification, which was well within its judicial power under Rule 23. The class certification order did not constitute a usurpation of judicial power by the district court warranting a writ of mandamus, and the Eighth Circuit did not abuse its discretion in refusing to issue a writ. Neither of these discretionary rulings merit review by this Court.

Nor does the fact that Judge Weiner was a transferee judge in a multidistrict case lend any significance to an otherwise routine class certification order. Judge Weiner's refusal to follow Judge Alsop's earlier order denying certification presents no meaningful issue regarding the "law of the case" doctrine. Judge Weiner had new facts, new law and, most importantly, three new cases before him which were not even filed when Judge Alsop denied certification. The doctrine of "law of the case" was neither breached nor applicable.

## I

## THE DENIAL OF THE WRIT OF MANDAMUS IS IN ACCORD WITH THE LAW OF THIS COURT AND IS NOT IN CONFLICT WITH THE LAW OF ANY OTHER CIRCUIT

### A. Congress and This Court Have Established A Policy Against Appellate Review of Non-Final Orders

Defendants seek review of the court of appeals' refusal to issue a writ of mandamus requiring a district court judge to vacate a discretionary order of class certification. Issuance of a writ to review this routine discretionary ruling is unnecessary, would open a wide hole in the final judgment rule, 28 U.S.C. § 1291, and would invite litigants

dissatisfied with class action rulings to pursue piecemeal appeals contrary to established legislative and judicial policy. *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 471 (1978); *Allied Chemical Corp.* v. *Daiflon, Inc.* 449 U.S. 33, 36 (1980).

Congress has mandated that appellate review should occur only after final judgment. *Allied Chemical, supra,* at 35. This Court has ruled that "[o]rders relating to class certification are not independently appealable under § 1291 prior to judgment." *Coopers & Lybrand, supra* at 470. This finality requirement "prevents the debilitating effect on judicial administration" caused by piecemeal appeals in the same case.[8] *Coopers & Lybrand, supra* at 471, 473.

Since *Coopers & Lybrand,* this Court has reaffirmed that appellate review of class certification orders is inappropriate because they are "inherently tentative". *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 103 S.Ct. 927, 935, n.14 (1983). Class certification orders are entered at the initial stage of a case, often before all of the facts and parties have been fully defined, and Rule 23(c)(1) accordingly provides that such orders may be modified prior to final judgment. The tentativeness of such orders is particularly appropriate in multidistrict litigation where there are multiple plaintiffs, complex facts, and the consolidation of related cases.

Issuance of a writ of mandamus to control class certification would deprive a district court of the discretion granted it under Rule 23(c)(1) to alter or amend certification orders as the litigation develops. To sanction review of such orders by mandamus would relegate the final judgment rule

[8] This case is a prime example of the undesirability of piecemeal appeals and the consequent burden on the judiciary. Defendants have already filed two mandamus petitions with the Eighth Circuit seeking to overturn the class certification order.

to "the mercy of any court of appeals which [chooses] to disregard it." *Allied Chemical, supra* at 36. It would also substitute the discretion of the courts of appeals for that of the trial courts, *Coopers & Lybrand, supra* at 474, n.24, 476, n.28, and nullify the requirements of 28 U.S.C. § 1292(b). Appellate courts would be "thrust into the trial process", *Coopers & Lybrand, supra* at 476, "with the district courts as litigants", *Allied Chemical, supra* at 35, and the intended efficiency of multidistrict litigation and the finality requirement of Section 1291 would be completely undermined.

### B. No Special Standard Is Necessary For the Law of The Case Doctrine in Multidistrict Litigation

Lacking an issue of true importance, defendants urge this Court to set a special standard to relieve the supposed "tension" between the "law of the case" doctrine and the powers of a transferee judge in a multidistrict proceeding. Absent the creation of such a standard, defendants contend, there is a potential for gross misuse and abuse of multidistrict proceedings.

Defendants are requesting the creation of a special standard to solve a non-existent problem. Out of approximately 500 multidistrict cases filed, not one has demonstrated the need for such a standard. Indeed, in the few multidistrict cases cited by defendants, the courts easily disposed of the issues before them without concern for tension or potential abuse.

Transferee courts in multidistrict litigation routinely decide class certification, discovery, and similar interlocutory matters. These decisions are necessarily discretionary and depend on the factual record before the court at the time of its ruling. Rulings on such issues require no special standard as suggested by defendants.

The power of a transferee judge to review and revise discretionary discovery orders of the transferor court was clearly recognized in *In Re The Upjohn Co. Antibiotic Cleocin Products Liability Litigation*, 664 F.2d 114, 118 (6th Cir. 1981) and *In Re Multi-Piece Rim Products Liability Litigation*, 653 F.2d 671, 676 (D.C. Cir. 1981).

Similarly, the transferee judge is empowered to determine the class action questions because *all* of the parties, claims, and defenses are before him in one proceeding. As stated in *In Re Plumbing Fixture Cases*, 298 F.Supp. 484, 493 and 496 (JPML 1968):

> It is the clear intent of Section 1407 to invest the transferee court with the exclusive powers, after transfer, to make the pretrial determinations of the class action questions. In the similar protection devices litigation we said: "Determination of all matters involving questions of class action shall be left to the sound judgment of . . . the transferee judge . . . ."
>
> • • •
>
> In the case of class action determinations made by the transferor court prior to transfer, the provisions of Rule 23 apply permitting the transferee court to determine the class action questions and to review and revise the class action order as in its sound judicial discretion is desirable or necessary in the interest of justice.

*See also State of Illinois* v. *Harper & Row Publishers, Inc.*, 301 F.Supp. 484, 492 (N.D. Ill. 1969).

Moreover, there has been no breach of the "law of the case" doctrine in this situation. Judge Weiner's decision to certify the class was based on a record of changed law and facts which was not before Judge Alsop. Judge Weiner was presented with additional class representatives providing broader geographic representation and additional materials, as well as several new decisions supporting certification.

Judge Weiner also had before him new cases which were not subject to Judge Alsop's prior order. Judge Arnold aptly recognized that the "law of the case" doctrine is inapplicable to these new cases:

> The court, though conceding that the doctrine of "law of the case" may not be an inflexible command, invokes the doctrine to support its reasoning. To this I reply: "the law of *what* case?" Judge Alsop's decision might indeed be the law of the case brought in Minnesota by Hoyt Construction Co. and Minnesota Exteriors, Inc., but how can it be the law of the cases later brought by Western Builders, Inc., and Lagar Construction Co. in California, by Midwest Builders & Materials, in Illinois, and by Riverside Builders, the last case having been filed while this petition was pending before us? None of these later filing plaintiffs was before Judge Alsop; none of them had a chance to argue before him that a class should be certified; yet all seem to be concluded by his ruling. . . .
>
> Surely the view that the filing of three new actions in far away states by four new corporate plaintiffs justifies a new look at the class question, is not so unreasonable as to be a "usurpation of power." . . . (Petition, Appendix, H-16—H-17)

Defendants contend that there is no standard for applying the law of the case doctrine in multidistrict litigation. There is a standard, but it is not the rigid one that defendants wish to impose. Class action decisions by a transferee judge necessarily must be on a case-by-case basis. The standard that the transferee judge applies is to consider the transferor judge's prior rulings, and then make his own decision in light of the post-consolidation circumstances. Judge Weiner's decision not to follow a court's refusal to certify was not a usurpation of power; nor was it even unique. *See, e.g., State of Illinois* v. *Harper & Row Publishers, Inc., supra; Plumbing Fixtures Antitrust Litigation, supra;* and *Plywood Antitrust Litigation,* M.D.L. 159.

The cases cited by defendants as "appropriate cases" (Petition, 8-9) in support of the application of the "law of the case" doctrine are not on point. *Hayman Cash Register Co.* v. *Sarokin*, 669 F.2d 162 (3d Cir. 1982) involved the power of a district court to retransfer a case to its original forum after a transfer pursuant to 28 U.S.C. § 1406(a), not the power to modify a class certification decision. Such transfer orders are not "inherently tentative", and are by nature subject to the principles of comity. *Otten* v. *Stonewall Insurance Co.*, 538 F.2d 210 (8th Cir. 1976) also did not involve a class certification decision. In *Otten*, a decision on a former appeal (concerning the sufficiency of the evidence on a motion for judgment notwithstanding the verdict) was held to conclusively determine the same question when presented in a second appeal. Finally, *ACF Industries, Inc.* v. *Guinn*, 384 F.2d 15 (5th Cir. 1967), *cert. denied*, 390 U.S. 949 (1968), as stated at page 13, note 12, *infra*, did not involve a class certification decision, but a stay order.

*Sley* v. *Jamaica Water & Utilities, Inc.*, 77 F.R.D. 391 (E.D.Pa. 1977) and *Kramer* v. *Scientific Control Corp.*, 67 F.R.D. 98 (E.D.Pa. 1975), *appeal dismissed in part, reversed in part on other grounds*, 534 F.2d 1085 (3d Cir.), *cert. denied sub nom, Arthur Andersen & Co.* v. *Kramer*, 429 U.S. 830 (1976) (Petition, 9) are also inapposite. Neither was a multidistrict case and thus did not raise the issues raised by defendants here.[9]

[9] In *Sley*, on the "eve of trial" and six years after the order of class certification, the defendants attempted to decertify the class based on the alleged conflict of interest of plaintiffs' counsel. Since the court was not convinced that the conflict in fact existed, it refused to decertify the class. In *Sley*, the court did in fact recognize that it had the power to change a certification ruling but did not find the alleged conflict of interest an appropriate basis to do so. In *Kramer*, the court denied defendants' motion for reconsideration of class certification on the basis that the alleged grounds for decertification could have been asserted earlier but were not. The "law of the case" doctrine was not even mentioned.

The "tension" between the "law of the case" doctrine and the responsibilities of a multidistrict transferee judge simply does not exist. To grant review of the ruling of the Eighth Circuit denying defendants' latest request for a writ of mandamus would only encourage other litigants dissatisfied with a district court's class certification order to burden the appellate courts with similar petitions.

### C. Denial of The Writ of Mandamus In This Case Was Proper

Mandamus is a drastic remedy, to be invoked only in extraordinary situations. This Court has held that "[o]nly exceptional circumstances, amounting to a *judicial usurpation of power,* will justify the invocation of this extraordinary remedy." *Allied Chemical Corp.* v. *Daiflon, Inc.,* 449 U.S. 33, 35 (1980) (emphasis added). This Court has similarly stated that mandamus should be used *"only* 'to confine an inferior court to a *lawful exercise* of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.' " *Id.* at 35, (emphasis added), quoting *Will* v. *United States,* 389 U.S. 90, 95 (1967) and *Roche* v. *Evaporated Milk Association,* 319 U.S. 21, 26 (1943).

The Petition does not present any exceptional circumstances. The judicial usurpation of power required by *Allied Chemical* is notably absent. Judge Weiner did nothing more than exercise his discretion under Rule 23. Judge Weiner was not obligated to follow Judge Alsop's class ruling, but only to consider it (which he did) in his review. *In Re The Upjohn Co. Antibiotic Cleocin Prods. Liability Litigation, supra* at 118-120. In certifying the class, he acted within the mandate of the Panel, the authority conferred by Rule 23, and well established law.

Nor was Judge Weiner's certification of a class after Judge Alsop had refused to do so an abdication of his judi-

cial function warranting the issuance of a supervisory writ under *La Buy* v. *Howes Leather Co.*, 352 U.S. 249, 297 (1957) (cited in Petition, 14).[10] The "supervisory" mandamus in *La Buy* applied to a situation where the district court judge had deprived litigants of a trial by the court in persistent disregard of the directive of the court of appeals.[11] Here Judge Weiner did not ignore an appellate court's order. He merely exercised the authority conferred upon him as the transferee judge.[12] Significantly, defendants have ignored other cases holding mandamus inappropriate to review class certification orders. *See, e.g., In Re Alleghany Corp.*, 634 F.2d 1148 (8th Cir. 1980); *J. H. Cohn & Co.* v. *American Appraisal Associates*, 628 F.2d 994 (7th Cir. 1980) (specifically declining to apply the *La Buy* supervisory writ); *Bauman* v. *United States District Court*, 557 F.2d 650 (9th Cir. 1977) specifically declining to apply

[10] In *La Buy*, a writ was issued because the trial judge's reference of a trial to a master was a *clear abuse* of discretion and ignored the admonition of the Seventh Circuit against such references. Thus the mandamus was based on the policy of preventing a judge from persistently disregarding the rules and warnings of the appellate court and avoiding his judicial duties.

[11] In *United States* v. *Haley*, 371 U.S. 18 (1962) and *United States* v. *Ritter*, 273 F.2d 30 (10th Cir. 1959) *cert. denied*, 362 U.S. 950 (1960) (cited in Petition 15), as in *La Buy*, the writs were issued because the district courts entered orders contradicting express directives from courts of appeals.

[12] *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 103 S.Ct. 927 (1983) (Petition, p. 14) was not a mandamus case and actually supports plaintiffs' position. In that case, this Court reaffirmed *Coopers* and the inherently tentative nature of class certification orders. *ACF Industries, Inc.* v. *Guinn*, 384 F.2d 15 (5th Cir. 1967), *cert. denied*, 390 U.S. 949 (1968) (cited at Petition, 13), was not a class action case and has no application here in light of this Court's rulings in *Coopers* and *Moses*. In *ACF*, the writ was issued to protect the permanent nature of a stay order. In this case, however, mandamus would destroy the inherently tentative nature of a class certification order.

the *La Buy* supervisory writ); *Interpace Corp.* v. *City of Philadelphia*, 438 F.2d 401 (3d Cir. 1971).[13]

## II

## AN EQUALLY DIVIDED VOTE BY A FEDERAL COURT OF APPEALS SITTING EN BANC AFFIRMS THE DISTRICT COURT RULING

### A. The Eighth Circuit Practice Is To Affirm The Judgment of the District Court

The Eighth Circuit has a long-established practice affirming the district court when the court of appeals sitting *en banc* is equally divided. *Tinker* v. *Des Moines Independent Community School District*, 383 F.2d 988 (8th Cir. 1967). The existence of this practice is sanctioned under Rule 47 of the Federal Rules of Appellate Procedure. Given the longevity of the practice, defendants cannot claim surprise (Petition, 20).

### B. The Practice of Other Courts of Appeals Is To Affirm a Lower Court Judgment With an Equally Divided En Banc Ruling

The Eighth Circuit practice regarding the effect of equally divided *en banc* decisions conforms to that of other courts of appeal. Contrary to defendants' claim of "confusion and uncertainty" (Petition, 19), it is well established

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[13] *McDonnell Douglas Corp.* v. *U.S. District Court for the Central District of California*, 523 F.2d 1083 (9th Cir. 1975), *cert. denied sub nom. Flanagan* v. *McDonnell Douglas Corp.*, 425 U.S. 911 (1976) and *Schmidt* v. *Fuller Brush Co.*, 527 F.2d 532, (8th Cir. 1975), (cited in Petition, 15) are also factually inapplicable to this case. In both, the appellate courts issued writs because the district courts had improperly applied the Federal Rules in granting class certification. In *McDonnell*, the district court's certification of a class for damages was contrary to Rule 23(b)(2) and a prior Ninth Circuit decision. Similarly, in *Schmidt*, the district court certified a class action in a Fair Labor Standards Act case under Rule 23, in direct disregard of a statute mandating a totally different procedure in such cases.

that lower court judgments are affirmed by equally divided courts of appeals sitting *en banc*.[14] As stated in Vol. 40, New York University Law Review 568, 584 (1965): "The circuits follow the Supreme Court practice of affirming the lower court decision in such instances . . . ." *See Biggers* v. *Tennessee*, 390 U.S. 404 (1968), *rehearing denied*, 390 U.S. 1037 (1968).

None of defendants' cases supports their position. In *Carmichael* v. *Eberle*, 177 U.S. 63 (1900), a territorial appellate court voted 2-1 for a reversal. A motion for a rehearing was denied by a 2-2 divided Court. In *Carmichael* the only issue was whether a rehearing would be granted. The divided court did not address the merits. The case merely states that a majority is needed to grant a rehearing. In this case, however, there is no question that the Eighth Circuit granted a rehearing. *Bishop* v. *Wood*, 498 F.2d 1341 (4th Cir. 1974), *aff'd*, 426 U.S. 341 (1976), is also misinterpreted by defendants and actually supports plaintiffs. In that case, the *en banc* court affirmed the lower court, *not* the panel, in accordance with other precedent in the Fourth Circuit. *See United States* v. *Kimes*, 458 F.2d 36 (4th Cir. 1972); *United States* v. *Mandel*, 602 F.2d 653 (4th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980).

[14] *See Drake Bakeries Inc.* v. *Local 50, American Bakery & C. Wkrs.*, 294 F.2d 399, 400 (2d Cir. 1961), *aff'd on other grounds*, 370 U.S. 254 (1962); *Commonwealth of Penn.* v. *Local Union 542, International Union of Operating Engineers*, 648 F.2d 923, 924 (3d Cir. 1981), *rev'd on other grounds*, 102 S.Ct. 3141 (1982); *United States* v. *Mandel*, 602 F.2d 653 (4th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980); *United States* v. *Geders*, 585 F.2d 1303, 1305-1306 (5th Cir. 1978), *cert. denied*, 441 U.S. 922 (1979); *Ramsey* v. *United Mine Workers of America*, 416 F.2d 655 (6th Cir. 1969), *rev'd on other grounds*, 401 U.S. 302 (1971); *United States* v. *Clavey*, 578 F.2d 1219 (7th Cir. 1978), *cert. denied*, 439 U.S. 954 (1978); *Tinker* v. *Des Moines Independent Community School Dist.*, 383 F.2d 988 (8th Cir. 1967), *rev'd on other grounds*, 393 U.S. 503 (1969).

## CONCLUSION

There is no reason for this Court to issue a Writ of Certiorari in this case. The Petition should be denied.

Dated: July 25, 1983

Respectfully Submitted,

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## APPENDIX A

### PROCEDURAL HISTORY

*June 4, 1975,* Plaintiffs Hoyt Construction Company, Inc. (Hoyt) and Minnesota Exteriors, Inc. (MEI) commence antitrust class action in the District of Minnesota.

*August 24, 1978,* Order denies motion of plaintiffs Hoyt and MEI for class action certification (Alsop, J).

*January 21, 1980,* Order denies renewed class action motion by Hoyt and MEI (Alsop, J).

*February 8, 1980,* Order denies plaintiffs (Hoyt and MEI) motion to alter or amend or for relief from Order of January 21, 1980 (Alsop, J).

*December 9, 1980,* Plaintiffs Western Builders, Inc. (Western) and Lagar Construction Company (Lagar) commence antitrust class action in the Northern District of California.

*December 22, 1980,* Plaintiff Midwest Builders and Materials, Inc. (Midwest) commences antitrust class action in the Northern District of Illinois.

*January 26, 1981,* Defendants move the Judicial Panel on Multidistrict Litigation to consolidate and transfer to the District of Minnesota pursuant to 28 U.S.C. § 1407.

*April 8, 1981,* Order of the Judicial Panel on Multidistrict Litigation transfers litigation to the District of Minnesota and assigns The Honorable Charles R. Weiner, Judge of the United States District Court for the Eastern District of Pennsylvania, to sit by designation.

*June 22, 1981,* Motion by plaintiffs Hoyt, MEI, Western, Lagar and Midwest for class action certification and other relief.

*August 3, 1981,* Memorandum and opinion certified class (Weiner, J).

*August 18, 1981,* Defendants' motion to vacate class action order or for certification pursuant to 28 U.S.C. § 1292(b).

*October 16, 1981,* Defendants' first petition for writ of mandamus.

*October 27, 1981,* Defendants' first petition for writ of mandamus voluntarily dismissed.

*October 30, 1981,* Hearing on defendants' motion to vacate class action or for certification pursuant to 28 U.S.C. § 1292(b) (Weiner, J).

*January 5, 1982,* Order denies motion to vacate class action order or for certification pursuant to 28 U.S.C. § 1292(b) (Weiner, J).

*January 20 1982,* Defendants' second petition for writ of mandamus.

*February 19, 1982,* Riverside Builders, Inc. commences antitrust class action in the Northern District of Illinois.

*February 24, 1982,* Plaintiffs' answer to petition for writ mandamus.

*March 9, 1982,* Order of the Judicial Panel on Multidistrict Litigation transfers Riverside Builders case to the District of Minnesota.

*December 29, 1982,* Opinion, dissent and judgment of Eighth Circuit Court of Appeals.

*January 11, 1983,* Petition for rehearing *en banc.*

*February 11, 1983,* Order of Eighth Circuit Court of Appeals grants rehearing *en banc.*

*April 28, 1983,* Order of Eighth Circuit Court of Appeals sitting *en banc* denies petition for writ of mandamus.

## APPENDIX B

### DESIGNATION OF DISTRICT JUDGE FOR SERVICE IN ANOTHER CIRCUIT

The Chief Judge of the Eighth Circuit having certified that there is a necessity for the assignment of a judge from another circuit to perform the duties of district judge and hold a district court in the District of Minnesota; and the Chief Judge of the Third Circuit having consented to the designation and assignment of the Honorable Charles R. Weiner, United States District Judge for the Eastern District of Pennsylvania, in that Circuit, to hold the District Court in the District of Minnesota during the period beginning September 1, 1975, and ending September 1, 1976, now, therefore, pursuant to the authority vested in me by Title 28, United States Code, Section 292(d), I do hereby designate and assign the said Charles R. Weiner to perform the duties of district judge and hold a district court in the District of Minnesota during the period beginning September 1, 1975, and ending September 1, 1976, and for such additional time in advance thereof to prepare for the trial of cases, or thereafter as may be required to complete unfinished business.

/s/ WARREN E. BURGER
Chief Justice of the United States

Dated: Washington, D.C., September 8, 1975.

## APPENDIX C

COCHRANE & BRESNAHAN, P.A.
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July 20, 1981

The Honorable Charles R. Weiner
Judge of the U.S. District Court
6613 South U.S. Courthouse
Independence Mall West
Philadelphia, Pennsylvania 19106

Re: Aluminum Siding and Coil Antitrust Litigation
MDL 454

Dear Judge Weiner:

We enclose herewith Plaintiffs' Joint Brief in Support of Motion for Class Action Determination together with an Affidavit in Support thereof. Also enclosed is a copy of the materials distributed by U.S. Steel/Alside which graphically describe the products which are the subject of this litigation and the manner in which they are produced and applied.

Very truly yours,

John A. Cochrane

JAC:mm
Enclosure
cc: All counsel[1]

[1] Note to Counsel: Because of the volume of paper, a reproduction of the U.S. Steel/Alside materials are being sent only to lead counsel for each defendant.